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No. 6644

United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLIAM L. HUGHSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

GEORGE J. HATFIELD, Esq., United States Attorney,

ESTHER B. PHILLIPS, Esq., Assistant United States Attorney,

Attorneys for Plaintiff, 7th & Mission Sts., San Francisco, Calif.

HARRY F. SULLIVAN, Esq., Attorney for Defendant,

717–718 Humboldt Bank Bldg., San Francisco, Calif.

In the United States District Court for the Northern District of California, Southern Division.

No. 18,880–L.—LAW.

UNITED STATES OF AMERICA,

vs.

Plaintiff,

CARL A. HADER and WILLIAM C. HUGHSON,

Defendants.

COMPLAINT TO RECOVER UPON A BOND GIVEN FOR INCOME TAXES.

The plaintiff, United States of America, by its attorney, George J. Hatfield, United States Attorney for the Northern Judicial District of California, in this action at law, complains of the above-

named defendants, and for cause of action alleges, upon information and belief:

FIRST CAUSE OF ACTION.

I.

That plaintiff was at all times hereinafter mentioned and now is a corporation sovereign and body politic.

II.

That the defendant Carl A. Hader is an individual, citizen of the United States of America, inhabitant of the State of California, and a resident of the City of San Francisco, in the Northern Judicial District of said State and within the jurisdiction of this court; that [1*] Carl A. Hader, defendant above mentioned, is one and the same person as C. A. Hader, who executed as principal the instruments in writing upon which this suit is predicated.

That the defendant William L. Hughson is an individual, citizen of the United States of America, inhabitant of the State of California, and a resident of the city of San Francisco in the Northern Judicial District of said state and within the jurisdiction of this court; that the said defendant above mentioned, William L. Hughson, is one and the same person as W. L. Hughson, who executed as surety the instruments in writing upon which this suit is predicated.

III.

That this is a suit by the United States of America, of a civil nature, at law, founded on contract

*Page-number appearing at the foot of page of original certified Transcript of Record.

arising under the internal revenue laws of the United States, and is authorized and sanctioned by the Attorney General of the United States, at the request of the Commissioner of Internal Revenue.

IV.

That on, to wit, March 15, 1921, the defendant Carl A. Hader, pursuant to an Act of Congress entitled "An Act to provide revenue and for other purposes," approved February 24, 1919, filed in the office of the Collector of Internal Revenue for the First District of California, at San Francisco, California, his individual income tax return for the calendar year 1920, disclosing a tax liability due from said defendant to the plaintiff in the amount of One Hundred Thirty-six and 25/100 ($136.25) Dollars, which amount was duly assessed and paid.

V.

That thereafter the Commissioner of Internal Revenue, in accordance with the internal revenue laws and the rules and regulations duly prescribed and promulgated relative thereto, duly examined the income [2] tax return of said defendant for the calendar year 1920, and such other information as was before him in the matter, and found and determined therefrom that the income tax liability due from said defendant was greater than the amount shown to be due by his return to the extent of One Thousand Two Hundred Eight and 02/100 ($1,208.02) Dollars, and further found and determined that said defendant's return for the year 1920 was fraudulently made and that by reason

thereof there was due in addition to the tax a fraud penalty in the amount of Six Hundred Four and *e*1/100 ($604.01) Dollars, making a total amount due of One Thousand Eight Hundred Twelve and 03/100 ($1,812.03) Dollars, which was duly assessed by said Commissioner of Internal Revenue on the May, 1925, Special No. 9 income tax assessment list, page 0, line 0. That the Collector of Internal Revenue at San Francisco, notified said defendant of said assessment and made demand for payment thereof on, to wit, May 15, 1925. That on, to wit, May 18, 1925, J. G. Bright, then Deputy Commissioner of Internal Revenue, notified said defendant, in writing, that said assessment had been made in accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, and informed him further that under Section 279 (a) of the Revenue Act of 1924 he was privileged to file a claim for abatement of the assessment within ten days after notice and demand for payment, and that any such claim should be accompanied by a bond.

VI.

That upon receipt of said communication from then Deputy Commissioner J. G. Bright the said defendant filed an appeal with the United States Board of Tax Appeals in an attempt to get his tax liability redetermined.

That thereafter on, to wit, June 8, 1925, the said defendant executed a claim for abatement of the above-mentioned additional assessment and filed the same with the above-mentioned Collector of Internal Revenue on, to wit, June 25, 1925. [3]

VII.

That subsequently on, to wit, August 18, 1925, in consideration of the aforesaid Collector refraining from enforcing immediate payment of the tax assessed as aforesaid, the defendants, Carl A. Hader and William L. Hughson, executed a bond, and delivered same to said Collector, signed by them with the names C. A. Hader, principal, and W. L. Hughson, surety, wherein and whereby they firmly bound themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, unto the United States of America for the payment of the sum of Three Thousand Six Hundred Twenty-four and 06/100 ($3,624.06) Dollars, lawful money of the United States, which said bond contains the following condition, to wit:

> "NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1920 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect."

A copy of said bond is attached hereto, made a part hereof the same as if fully rewritten at length herein, and is marked Exhibit "A" for identification.

VIII.

That thereafter on, to wit, November 17, 1925, the United States Board of Tax Appeals made an order dismissing the appeal of Carl A. Hader, Docket No. 5226, above mentioned, for lack of jurisdiction. That by virtue of said action of the Board of Tax Appeals the assessment above referred to remained unmodified, unchanged and of full force and effect. That on, to wit, December 9, 1927, D. H. Blair, then Commissioner of Internal Revenue, informed the defendant Carl A. Hader, by letter of that date, that his claim for abatement hereinbefore referred to had been considered and was rejected for the full amount thereof, namely, One Thousand Eight Hundred Twelve and 03/100 ($1,812.03) Dollars, and further advised the defendant that he was authorized by law to appeal from said determination to the United States Board of Tax Appeals if he [4] was not satisfied. The defendant, however, did not take an appeal to the United States Board of Tax Appeals from the Commissioner's determination of the claim for abatement, in which he determined that the assessment was due and owing from said defendant. Thereafter on July 14, 1928, the defendant William L. Hughson was advised by the Collector aforesaid that the defendant Carl A. Hader had failed to pay the tax liability secured by the aforesaid bond, and demand was simultaneously made upon said defendant William L. Hughson for payment of the amount due. At various and divers other times demands have been made upon both of said defendants, yet they and each of them have wholly failed, neglected and re-

fused to pay any part or portion of the amount due under and by virtue of the aforesaid bond.

IX.

That the plaintiff has done all things required of it to be done under and by virtue of the terms and conditions of said bond, yet the defendants have wholly failed, neglected and refused to pay the amount due, in accordance with the terms of said bond, whereby they have breached the condition of their said bond and the promise thereof and therein contained has become and now is absolute, and there has accrued to the plaintiff an action to demand and have of said defendants and each of them on said bond the sum of One Thousand Eight Hundred Twelve and 03/100 ($1,812.-03) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, the date of first notice and demand for payment of the tax liability, as by law provided.

WHEREFORE, the plaintiff, United States of America, prays judgment in this cause of action against the defendants, Carl A. Hader and William L. Hughson, and each of them, for the sum of One Thousand Eight Hundred Twelve and 03/100 ($1,812.03) Dollars with interest thereon at twelve per cent per annum from May 15, 1925, and costs and disbursements herein. [5]

And further complaining of the defendants for a

SECOND CAUSE OF ACTION

plaintiff adopts as and for Paragraphs I, II and III hereof, Paragraphs I, II and III, respectively, of

its first cause of action and makes same a part of this second cause of action as fully and to the same extent as if rewritten at length herein.

IV.

That on, to wit, March 15, 1922, the defendant Carl A. Hader, pursuant to an Act of Congress entitled "An Act to reduce and equalize taxation, to provide revenue, and for other purposes," approved November 23, 1921, filed in the office of the Collector of Internal Revenue for the First District of California, at San Francisco, California, his individual income tax return for the calendar year 1921, disclosing a tax liability due from said defendant to the plaintiff in the amount of One Hundred Thirty-two and 31/100 ($132.31) Dollars, which amount was duly assessed and paid.

V.

That thereafter the Commissioner of Internal Revenue of the United States, in accordance with the internal revenue laws and the rules and regulations duly prescribed and promulgated relative thereto, duly examined the income tax return of said defendant for the calendar year 1921 and such other information as was before him in the matter and found and determined therefrom that the income tax liability due from said defendant was greater than the amount shown to be due by his return to the extent of Eight Hundred Eighty-two and 07/100 ($882.07) Dollars, and further found and determined that said defendant's return for the year 1921 was fraudulently made and that by

reason thereof there was due in [6] addition to the tax a fraud penalty in the amount of Four Hundred Forty-one and 04/100 ($441.04) Dollars, making a total amount due of One Thousand Three Hundred Twenty-three and 11/100 ($1,323.11) Dollars, which was duly assessed by said Commissioner of Internal Revenue on the May, 1925, Special No. 9 income tax assessment list, page 0, line 1. That the Collector of Internal Revenue at San Francisco, California, notified said defendant of said assessment and made demand for payment thereof on, to wit, May 15, 1925. That on, to wit, May 18, 1925, J. G. Bright, then Deputy Commissioner of Internal Revenue, notified said defendant, in writing, that said assessment had been made in accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, and informed him further that under Section 279 (a) of the Revenue Act of 1924 he was privileged to file a claim for abatement of the assessment within ten days after notice and demand for payment, and that any such claim should be accompanied by a bond.

VI.

That upon receipt of said communication from the Deputy Commissioner J. G. Bright the said defendant filed an appeal with the United States Board of Tax Appeals in an attempt to get his tax liability redetermined.

That on, to wit, June 8, 1925, the said defendant executed a claim for abatement for the year 1921 in the amount of One Thousand Five Hundred Forty-one and 42/100 ($1,541.42) Dollars, which

included the above-mentioned additional assessment, and filed the same with the above-mentioned Collector of Internal Revenue on, to wit, June 25, 1925.

VII.

That subsequently on, to wit, August 18, 1925, in consideration of the aforesaid Collector refraining from enforcing immediate payment of the tax, assessed as aforesaid, the defendants, Carl A. Hader and William L. Hughson, executed a bond and delivered same to said Collector, signed by them with their respective names and under the style: "C. A. Hader, principal, W. L. Hughson, surety," wherein and whereby they firmly bound themselves, their [7] heirs, executors, administrators, successors and assigns, jointly and severally, unto the United States of America for the payment of the sum of Three Thousand Eighty-two and 84/100 ($3,082.-84) Dollars, lawful money of the United States, which said bond contains the following condition, to wit:

> "NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1921 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect."

A copy of said bond is attached hereto, made a part hereof the same as if fully rewritten at length herein, and is marked Exhibit "B" for identification.

VIII.

That thereafter on to wit, November 17, 1925, the United States Board of Tax Appeals made an order dismissing the appeal of Carl A. Hader, Docket No. 5226, above mentioned, for lack of jurisdiction. That by virtue of said action of the Board of Tax Appeals the assessment above referred to remained unmodified, unchanged, and of full force and effect. That on, to wit, December 9, 1927, D. H. Blair, then Commissioner of Internal Revenue, informed the defendant Carl A. Hader, by letter of that date, that his claim for abatement hereinbefore referred to had been considered and was rejected for the full amount thereof, namely, One Thousand Five Hundred Forty-one and 42/100 ($1,541.42) Dollars, and further advised the defendant that he was authorized by law to appeal from said determination to the United States Board of Tax Appeals if he was not satisfied. The defendant, however, did not take an appeal to the United States Board of Tax Appeals from the Commissioner's determination of the claim for abatement, in which he determined that the assessment was due and owing from said defendant. Thereafter on July 14, 1928, the defendant William [8] L. Hughson was advised by the Collector aforesaid that the defendant Carl A. Hader had failed to pay the tax liability secured by the aforesaid bond, and

demand was simultaneously made upon said defendant William L. Hughson for payment of the amount due. At various and divers other times demands have been made upon both of said defendants, yet they and each of them have wholly failed, neglected and refused to pay any part or portion of the amount due under and by virtue of the aforesaid bond.

IX.

That the plaintiff has done all things required of it to be done under and by virtue of the terms and conditions of said bond, yet the defendants have wholly failed, neglected and refused to pay the amount due, in accordance with the terms of said bond, whereby they have breached the condition of their said bond and the promise thereof and therein contained has become and now is absolute, and there has accrued to the plaintiff an action to demand and have of said defendants and each of them on said bond the sum of One Thousand Three Hundred Twenty-three and 11/100 ($1,323.11) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, the date of first notice and demand for payment of the tax liability, as by law provided.

WHEREFORE, the plaintiff, United States of America, prays judgment in this cause of action against the defendants, Carl A. Hader and William L. Hughson, and each of them, for the sum of One Thousand Three Hundred Twenty-three and 11/100 ($1,323.11) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, and costs and disbursements herein. [9]

And further complaining of the defendants for a

THIRD CAUSE OF ACTION

plaintiff adopts as and for paragraph I, II and III hereof, paragraph I, II and III, respectively, of its first cause of action and makes same a part of this third cause of action as fully and to the same extent as if rewritten at length herein.

IV.

That the defendant Carl A. Hader failed and neglected to file an income tax return for the calendar year 1922, showing the amount of his income and the income tax liability due thereon, as required by the provisions of an Act of Congress entitled "An Act To reduce and equalize taxation, to provide revenue, and for other purposes," approved November 23, 1921, although a return was due and should have been filed on or before March 15, 1923.

That the Commissioner of Internal Revenue of the United States, through his proper officers, in accordance with and by authority of the internal revenue laws and the rules and regulations duly prescribed and promulgated relative thereto, made an investigation of said defendant's financial affairs and transactions and found and determined that there was due from said defendant for the calendar year 1922 an income tax in the amount of Six Hundred Thirty-one and 81/100 ($631.81) Dollars, and further found and determined that said defendant had wilfully and fraudulently failed and neglected to make a true and correct return of his income for said year and that by reason thereof there was due in addition to the said tax a fraud penalty in the

amount of Three Hundred Fifteen and 90/100 ($315.90) Dollars, making a total sum due for said year of Nine Hundred Forty-seven and 71/100 ($947.71) Dollars, which amount was duly assessed by said Commissioner of Internal Revenue on the May, 1925, Special No. 9 income tax assessment list, page 0, line 2, against said defendant. [10]

That the Collector of Internal Revenue at San Francisco, California, notified said defendant of said assessment and made demand on him for payment thereof on, to wit, May 15, 1925. That on, to wit, May 18, 1925, J. G. Bright, then Deputy Commissioner of Internal Revenue, notified said defendant, in writing, that said assessment had been made in accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, and informed him that under Section 279 (a) of the Revenue Act of 1924 he was privileged to file a claim for abatement of the assessment within ten days after notice and demand for payment, and that any such claim should be accompanied by a bond.

V.

That upon receipt of said communication from then Deputy Commissioner J. G. Bright, the said defendant filed an appeal with the United States Board of Tax Appeals in an attempt to get his tax liability redetermined.

That on, to wit, June 8, 1925, the said defendant executed a claim for abatement for the year 1922 in the amount of One Thousand Forty-seven and 22/100 ($1,047.22) Dollars, which included the above-mentioned assessment and filed the same with

the above-mentioned Collector of Internal Revenue on, to wit, June 25, 1925.

VI.

That subsequently on, to wit, August 18, 1925, in consideration of the aforesaid Collector refraining from enforcing immediate payment of the tax assessed as aforesaid, the defendant Carl A. Hader and William L. Hughson executed a bond and delivered same to said Collector, signed by them with their respective names and under the style "C. A. Hader, principal, W. L. Hughson, surety," wherein and whereby they firmly bound themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, unto the United States of America for the payment of the sum of Two Thousand Ninety-four and 44/100 ($2,094.44) Dollars, lawful money of the United States, which said bond contains the following condition to wit: [11]

> "NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1922 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect."

A copy of said bond is attached hereto, made a part hereof the same as if fully rewritten herein, and is marked Exhibit "C" for identification.

VII.

That thereafter on, to wit, November 17, 1925, the United States Board of Tax Appeals made an order dismissing the appeal of Carl A. Hader, Docket No. 5226, above mentioned, for lack of jurisdiction. That by virtue of said action of the Board of Tax Appeals the assessment above referred to remained unmodified, unchanged and of full force and effect. That on, to wit, December 9, 1927, D. H. Blair, then Commissioner of Internal Revenue, informed the defendant Carl A. Hader, by letter of that date, that his claim for abatement hereinbefore referred to had been considered and was rejected for the full amount thereof, namely, One Thousand Forty-seven and 22/100 ($1,047.22) Dollars, and further advised the defendant that he was authorized by law to appeal from said determination to the United States Board of Tax Appeals if he was not satisfied. The defendant, however, did not take an appeal to the United States Board of Tax Appeals from the Commissioner's determination of the claim for abatement, in which he determined that the assessment was due and owing from said defendant. Thereafter on July 14, 1928, the defendant William L. Hughson was advised by the Collector aforesaid that the defendant Carl A. Hader had failed to pay the tax liability secured by the aforesaid bond, and demand was simultaneously made upon said defendant William L. Hughson for payment of the amount due. At various and divers other times demands have been made upon both of said defendants, yet they and each of them have wholly failed, neglected

and refused to pay any part or portion [12] of the amount due under and by virtue of the aforesaid bond.

VIII.

That the plaintiff has done all the things required of it to be done under and by virtue of the terms and conditions of said bond, yet the defendants have wholly failed, neglected and refused to pay the amount due, in accordance with the terms of said bond, whereby they have breached the condition of their said bond and the promise thereof and therein contained has become and now is absolute, and there has accrued to the plaintiff an action to demand and have of said defendants and each of them on said bond the sum of Nine Hundred Forty-seven and 71/100 ($947.71) Dollars, with interest thereon at twelve per cent. per annum from May 15, 1925, the date of first notice and demand for payment of the tax liability, as by law provided.

WHEREFORE, the plaintiff, United States of America, prays judgment in this cause of action against the defendants, Carl A. Hader and William L. Hughson, and each of them, for the sum of Nine Hundred Forty-seven and 71/100 ($947.71) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, and costs and disbursements herein.

And further complaining of the defendants above mentioned for a

FOURTH CAUSE OF ACTION

plaintiff adopts as and for paragraphs I, II and

III hereof paragraphs I, II and III respectively of its first cause of action and makes same a part of this third cause of action as fully and to the same extent as if rewritten at length herein.

IV.

The on, to wit, March 15, 1924, the defendant Carl A. Hader, pursuant to an Act of Congress entitled "An Act to reduce and equalize [13] taxation, to provide revenue, and for other purposes," approved November 23, 1921, filed in the office of the Collector of Internal Revenue for the First District of California, at San Francisco, California, his individual income tax return for the calendar year 1923, disclosing a tax liability due from said defendant to the plaintiff in the amount of Thirteen and 04/100 ($13.04) Dollars, which amount was duly assessed and paid.

V.

That thereafter the Commissioner of Internal Revenue of the United States, in accordance with and by authority of the internal revenue laws and the rules and regulations duly prescribed and promulgated relative thereto, duly examined the income tax return of said defendant for the calendar year 1923 and such other information as was before him in the matter and found and determined therefrom that the income tax liability due from said defendant for said year was greater than the amount shown to be due by his return to the extent of Four Hundred Forty-seven and 20/100 ($447.20) Dollars, and further found and determined that

said defendant's return for the year 1923 was fraudulently made and that by reason thereof there was due in addition to the tax above mentioned a fraud penalty in the amount of Two Hundred Twenty-three and 60/100 ($223.60) Dollars, making a total sum due for said year of Six Hundred Seventy and 80/100 ($670.80) Dollars in addition to the amount shown by the return, which amount, Six Hundred Seventy and 80/100 ($670.80) Dollars, was duly assessed by said Commissioner of Internal Revenue on the May, 1925, Special No. 9 income tax assessment list, page 0, line 3, against said defendant. That the Collector of Internal Revenue at San Francisco, California, notified said defendant of said assessment and made demand for payment thereof on, to wit, May 15, 1925. That on, to wit, May 18, 1925, J. G. Bright, then Deputy Commissioner of Internal Revenue, [14] notified said defendant, in writing, that said assessment had been made in accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, and informed him further that under Section 279 (a) of the Revenue Act of 1924 he was privileged to file a claim for abatement of the assessment within ten days after notice and demand for payment, and that any such claim should be accompanied by a bond.

VI.

That upon receipt of said communication from the then Deputy Commissioner, J. G. Bright, the said defendant filed an appeal with the United

States Board of Tax Appeals in an attempt to get his tax liability redetermined.

That on, to wit, June 8, 1925, the said defendant executed a claim for abatement for the year 1923 in the amount of Seven Hundred and 99/100 ($700.99) Dollars, which included tthe above-mentioned additional assessment, and filed the same with the above-mentioned Collector of Internal Revenue on, to wit, June 25, 1925.

VII.

That subsequently on, to wit, August 18, 1925, in consideration of the aforesaid Collector refraining from enforcing immediate payment of the tax assessed as aforesaid, the defendants, Carl A. Hader and William L. Hughson, executed a bond, and delivered same to said Collector, signed by them with their respective names and under the style: "C. A. Hader, principal, W. L. Hughson, surety," wherein and whereby they firmly bound themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, unto the United States of America for the payment of the sum of One Thousand Four Hundred One and 98/100 ($1,401.98) Dollars, lawful money of the United States, which said bond contains the following condition to wit:

> "NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1923 as may be found due by the Commissioner, plus all penalties and interest, in

accordance with the terms of the extension granted, [15] and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect."

A copy of said bond is attached hereto, made a part hereof the same as if fully rewritten at length herein, and is marked Exhibit "D" for identification.

VIII.

That thereafter on, to wit, November 17, 1925, the United States Board of Tax Appeals made an order dismissing the said appeal of Carl A. Hader, Docket No. 5226, above mentioned, for lack of jurisdiction. That by virtue of said action of the Board of Tax Appeals the assessment above referred to remained unmodified, unchanged and of full force and effect. That on, to wit, December 9, 1927, D. H. Blair, then Commissioner of Internal Revenue, informed the defendant Carl A. Hader, by letter of that date, that his claim for abatement hereinbefore referred to had been considered and was rejected for the full amount, namely, Seven Hundred and 99/100 ($700.99) Dollars, and further advised the defendant that he was authorized by law to appeal from said determination to the United States Board of Tax Appeals if he was not satisfied. The defendant, however, did not take an appeal to the United States Board of Tax Appeals from the Commissioner's determination of the claim for abatement, in which he determined that the assessment was due and

owing from said defendant. Thereafter on July 14, 1928, the defendant William L. Hughson was advised by the Collector aforesaid, that the defendant Carl A. Hader had failed to pay the tax liability secured by the aforesaid bond, and demand was simultaneously made upon said defendant William L. Hughson for payment of the amount due. At various and divers other times demands have been made upon both of said defendants, yet they and each of them have wholly failed, neglected and refused to pay any part or portion of the amount due under and by virtue of the aforesaid bond. [16]

IX.

That the plaintiff has done all things required of it to be done under and by virtue of the terms and conditions of said bond, yet the defendants have wholly failed, neglected and refused to pay the amount due in accordance with the terms of said bond, whereby they have breached the condition of their said bond and the promise thereof and therein contained has become and now is absolute, and there has accrued to the plaintiff an action to demand and have of said defendants and each of them on said bond the sum of Six Hundred Seventy and 80/100 ($670.80) Dollars with interest thereon at twelve per cent per annum from May 15, 1925, the date of first notice and demand for payment of the tax liability, as by law provided.

WHEREFORE, the plaintiff, United States of America, prays judgment in this cause of action against the defendants, Carl A. Hader and Will-

iam L. Hughson, and each of them, for the sum of Six Hundred Seventy and 80/100 ($670.80) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, and costs and disbursements herein.

That the total amount for which plaintiff prays judgment in the four causes of action above set forth is Four Thousand Seven Hundred Fifty-three and 65/100 ($4,753.65) Dollars, with interest thereon at twelve per cent per annum from May 15, 1925, and for costs and disbursements herein.

GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS,
Ass't U. S. Attorney. [17]

EXHIBIT "A."

BOND OF CARL A. HADER ON ABATEMENT OF DEFICIENCY TAXES ASSESSED FOR THE YEAR 1920.

KNOW ALL MEN BY THESE PRESENTS:

That we, Carl A. Hader, of San Francisco, California, as principal, and W. L. Hughson, as surety, are held and firmly bound unto the United States of America in the sum of Three Thousand Six Hundred Twenty-four and Six one-hundredths ($3624.06) Dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents:

WHEREAS, there is due from the above bounden principal, Carl A. Hader, for additional income tax for the year 1920 an aggregate of One Thousand Eight Hundred Twelve and Three One-hundredths ($1812.03) Dollars resulting from deficiency taxes which the Commissioner of Internal Revenue claims to be due because of fraud with intent to evade tax, but which taxpayer confidently asserts to be erroneous; and

WHEREAS, the exact payment of the deficiency in tax at this time by said Principal will result in undue hardship to him, and

WHEREAS, Section 274–G of the Revenue Act of 1924 provides that the Commissioner, with the approval of the Secretary may extend the time for the payment of such deficiency in tax or any part thereof for such period as may be considered necessary, not, however, in excess of eighteen months, and may require the taxpayer to furnish a bond with sufficient sureties conditioned for the payment of the deficiency and interest thereon in accordance with the terms of the extension granted, and

WHEREAS, it appears that the amount of this bond is sufficient to cover the aggregate of the deficiency of taxes assessed against such principal for the year 1920, together with penalties and interest, and

WHEREAS, The principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year 1920, and desires that the payment of the deficiency

in tax be extended until the determination of said appeal, as a matter of fairness and justice.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1920 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 18th day of August, 1925.

C. A. HADER,
Principal.
W. L. HUGHSON,
Surety. [18]

EXHIBIT "B."

BOND OF CARL A. HADER ON ABATEMENT OF DEFICIENCY TAX ASSESSED FOR THE YEAR 1921.

KNOW ALL MEN BY THESE PRESENTS:

That we, Carl A. Hader, of San Francisco, California, as principal, and W. L. Hughson, as surety, are held and firmly bound unto the United States of America in the sum of Three Thousand Eighty-two and Eighty-four One Hundredths ($3082.84) Dollars, lawful money of the United States, for the payment thereof we bind ourselves, our heirs,

executors, administrators, successors and assigns jointly and severally, firmly by these presents.

WHEREAS, there is due from the above bounden principal, Carl A. Hader, for additional income tax for the year 1921 an aggregate of One Thousand Five Hundred Forty-one and Forty-two One-hundredths ($1541.42) Dollars, resulting from deficiency taxes which the Commissioner of Internal Revenue claims to be due because of fraud with intent to evade tax, but which taxpayer confidently asserts to be erroneous; and

WHEREAS, the exact payment of the deficiency in tax at this time by said principal will result in undue hardship to him, and

WHEREAS, Section 274–G of the Revenue Act of 1924 provides that the Commissioner, with the approval of the Secretary may extend the time for the payment of such deficiency in tax or any part thereof for such period as may be considered necessary, not, however, in excess of eighteen months, and may require the taxpayer to furnish a bond with sufficient sureties conditioned for the payment of the deficiency and interest thereon in accordance with the terms of the extension granted, and

WHEREAS, it appears that the amount of this bond is sufficient to cover the aggregate of the deficiency of taxes assessed against said Principal for the year 1921, together with penalties and interest; and

WHEREAS, the principal herein has perfected an appeal from the determination of the Com-

missioner assessing the deficiency tax for the year 1921, and desires that the payment of the deficiency in tax be extended until the determination of said appeal, as a matter of fairness and justice.

NOW, THEREFORE the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1921 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 18th day of August, 1925.

C. A. HADER,
Principal.
W. L. HUGHSON,
Surety. [19]

State of California,
City and County of San Francisco,—ss.

On this 18th day of August, in the year one thousand nine hundred and twenty-five, before me Wm. E. Schord, a notary public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared C. A. Hader and W. L. Hughson, known to me to be the persons described *in whose* names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the said City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California.
209–10 Hearst Building.

My commission expires March 18th, 1926.

State of California,
City and County of San Francisco,—ss.

W. L. Hughson, being first duly sworn, says: That he is a resident and freeholder of the City and County of San Francisco, State of California, and is worth the sum of Three Thousand Six Hundred Twenty-four and Six One-Hundredths ($3624.06) Dollars, over and above all of his debts and liabilities, and exclusive of property exempt from execution.

W. L. HUGHSON.

Subscribed and sworn to before me this 18th day of August, 1925.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California. [20]

State of California,
City and County of San Francisco,—ss.

On this 18th day of August, in the year one thousand nine hundred and twenty-five, before me, Wm. E. Schord, a notary public, in and for the City and County of San Francisco, residing therein,

duly commissioned and sworn, personally appeared C. A. Hader and W. L. Hughson, known to me to be the persons described *in whose* names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal in the said City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California.
209–10 Hearst Building.

My commission expires March 18th, 1926.

State of California,
City and County of San Francisco,—ss.

W. L. Hughson, being first duly sworn, says: That he is a resident and freeholder of the City and County of San Francisco, State of California, and is worth the sum of Three Thousand Eighty-two and Eighty-four One-hundredths ($3082.84) Dollars, over and above all of his debts and liabilities, and exclusive of property exempt from execution.

W. L. HUGHSON.

Subscribed and sworn to before me this 18th day of August, 1925.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California. [21]

EXHIBIT "C."

BOND OF CARL A. HADER ON ABATEMENT OF DEFICIENCY TAX ASSESSED FOR THE YEAR 1922.

KNOW ALL MEN BY THESE PRESENTS:

That we, Carl A. Hader, of San Francisco, California, as principal and W. L. Hughson, as surety, are held and firmly bound unto the United States of America in the sum of Two Thousand Ninety-four and Forty-four One-hundredths ($2094.44) Dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

WHEREAS, there is due from the above bounden principal, Carl A. Hader, for additional income tax for the year 1922 an aggregate of One Thousand Forty-seven and Twenty-two One-hundreths ($1047.22) Dollars, resulting from deficiency taxes which the Commissioner of Internal Revenue claims to be due because of fraud with intent to evade tax, but which taxpayer confidently asserts to be erroneous, and

WHEREAS, the exact payment of the deficiency in tax at this time by said principal will result in undue hardship to him; and

WHEREAS, Section 274–G of the Revenue Act of 1924 provides that the Commissioner, with the approval of the Secretary may extend the time for the payment of such deficiency in tax or any part thereof for such period as may be considered

necessary, not, however, in excess of eighteen months, and may require the taxpayer to furnish a bond with sufficient sureties conditioned for the payment of the deficiency and interest thereon in accordance with the terms of the extension granted; and

WHEREAS, it appears that the amount of this bond is sufficient to cover the aggregate of the deficiency of taxes assessed against said principal for the year 1922, together with penalties and interest; and

WHEREAS, the principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year 1922, and desires that the payment of the deficiency in tax be extended, until the determination of said appeal, as a matter of fairness and justice.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1922 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 18th day of August, 1925.

C. A. HADER,
Principal,
W. L. HUGHSON,
Surety. [22]

State of California,
City and County of San Francisco,—ss.

On this 18th day of August in the year one thousand nine hundred and twenty-five, before me, Wm. E. Schord, a notary public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared C. A. Hader and W. L. Hughson, known to me to be the persons described *in whose* names are described to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal in the said City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California,
209–10 Hearst Building.
My commission expires March 18th, 1926.

State of California,
City and County of San Francisco,—ss.

W. L. Hughson, being first duly sworn, says: That he is a resident and freeholder of the City and County of San Francisco, State of California, and is worth the sum of Two Thousand Ninety-four and Forty-four One Hundredths ($2094.44) Dollars, over and above all of his debts and liabilities, and exclusive of property exempt from execution.

W. L. HUGHSON.

Subscribed and sworn to before me, this 18th day of August 1925.

[Seal] WM. E. SCHORD,

Notary Public in and for the City and County of San Francisco, State of California. [23]

EXHIBIT "D."

BOND OF CARL A. HADER ON ABATEMENT OF DEFICIENCY TAX ASSESSED FOR THE YEAR 1923.

KNOW ALL MEN BY THESE PRESENTS:

That we, Carl A. Hader, of San Francisco, California, as principal, and W. L. Hughson, as surety, are held and firmly bound unto the United States of America in the sum of One Thousand Four Hundred One and Ninety-eight One-hundredths ($1401.98) Dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

WHEREAS, there is due from the above bounden principal, Carl A. Hader, for additional income tax for the year 1923 an aggregate of Seven Hundred and Ninety-nine One-hundredths ($700.99) Dollars, resulting from deficiency taxes which the Commissioner of Internal Revenue claims to be due because of fraud with intent to evade tax, but which taxpayer confidently asserts to be erroneous, and

WHEREAS, The exact payment of the deficiency in tax at this time by said principal will result in undue hardship to him; and

WHEREAS, Section 274–G of the Revenue Act of 1924 provides that the Commissioner, with the approval of the Secretary may extend the time for payment of such deficiency in tax or any part thereof for such period as may be considered necessary, not, however, in excess of eighteen months, and may require the taxpayer to furnish a bond with sufficient sureties conditioned for the payment of the deficiency and interest thereon in accordance with the terms of the extension granted; and

WHEREAS, it appears that the amount of this bond is sufficient to cover the aggregate of the deficiency of taxes assessed against said principal for the year 1923, together with penalties and interest; and

WHEREAS, the principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year 1923, and desires that the payment of the deficiency in tax be extended until the determination of said appeal, as a matter of fairness and justice.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1923 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 18th day of August 1925.

C. A. HADER,
Principal,
W. L. HUGHSON,
Surety. [24]

State of California,
City and County of San Francisco,—ss.

On this 18th day of August in the year one thousand nine hundred and twenty-five, before me, Wm. E. Schord, a notary public, in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared C. A. Hader and W. L. Hughson, known to me to be the persons described *in whose* names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal in the said City and County of San Francisco, the day and year in this Certificate first above written.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California,
209–10 Hearst Building.
My commission expires March 18th, 1926.

State of California,
City and County of San Francisco,—ss.

W. L. Hughson, being first duly sworn, says: That he is a resident and freeholder of the City and County of San Francisco, State of California,

and is worth the sum of One Thousand Four Hundred One and Ninety-eight One-hundredths ($1401.98) Dollars, over and above all of his debts and liabilities, and exclusive of property exempt from execution.

W. L. HUGHSON.

Subscribed and sworn to before me this 18th day of August 1925.

[Seal] WM. E. SCHORD,
Notary Public in and for the City and County of San Francisco, State of California. [25]

State and Northern District of California,
City and County of San Francisco,—ss.

Esther B. Phillips, being first duly sworn, deposes and says:

I am an Assistant United States Attorney for the Northern District of California. I make this verification in behalf of the plaintiff, a sovereign state. I have read the complaint and know the contents thereof. The same is true of my own knowledge, save as to matters therein referred to on information and belief, and as to those matters I believe it to be true.

ESTHER B. PHILLIPS.

Subscribed and sworn to this 7th day of January, 1931, before me.

[Seal] HARRY L. FOUTS,
Clerk of the United States District Court.

[Endorsed]: Filed Jan. 7, 1931. [26]

[Title of Court and Cause.]

ANSWER OF DEFENDANT WILLIAM L. HUGHSON.

Now come William L. Hughson, one of the defendants in the above-entitled action, and for answer to the complaint of plaintiff on file herein, denies and alleges as follows:

1. Answering the allegations in Paragraph VI of the first cause of action set forth in said complaint, this defendant admits the execution by him of the instrument referred to as a bond in said Paragraph VI, a copy of which is annexed to said complaint and marked Exhibit "A," but denies that there was any consideration for the execution of said instrument by this defendant; and denies that the appeal referred to in said instrument was ever taken and perfected by said C. A. Hader; and further alleges that said appeal so alleged therein to have been taken by said defendant Hader, was never perfected, and was dismissed as having been prematurely taken, and the said purported bond, Exhibit "A," never became operative, and did not stay, nor prevent, the enforcement or immediate collection by the Collector of Internal Revenue of Taxes, or Deficiency Taxes, claimed to be due from, or assessed against, said defendant, C. A. Hader. [27]

2. This defendant denies that the sum of eighteen hundred twelve and 3/100 (1812.03) dollars, or any part or portion thereof, or any other sum, is now,

or ever became due or owing from this defendant to the plaintiff herein, or to said Commissioner of Internal Revenue, or to said Collector of Internal Revenue, either under or in accordance with the terms of said bond, Exhibit "A," or otherwise, or at all; and further denies that any interest is now, or ever became due, owing or unpaid by this defendant either in accordance with the terms of said bond, Exhibit "A," or otherwise, or at all; denies that said, or any, promise contained in said bond, Exhibit "A," or otherwise, or elsewhere, ever became, or is now, absolute; and denies that there has accrued to plaintiff an action, or any action, to demand of this defendant on said bond, or otherwise, or at all, the sum of eighteen hundred twelve 3/100 (1812.03) dollars, or any part or portion thereof, or any other sum, or any interest thereof, or upon any other sum, at the rate of twelve (12) per cent per annum, or any other rate per cent per annum, from May 15th, 1925, or from any other date, or otherwise, or at all.

And for a second, further, separate and distinct defense to said first alleged cause of action, this defendant alleges that the cause of action therein set forth against this defendant is barred by the provisions of Section 791, Title 28 of the United States Code.

And for a third, further, separate, and distinct defense to said first alleged cause of action, this defendant alleges that said alleged bond, Exhibit "A," was not filed at the [28] time required by Law, and that it was never accepted or approved by

said Collector of Internal Revenue as required by Law.

And for the fourth, further, separate, and distinct defense to said first alleged cause of action set forth in said complaint, this defendant alleges that the claim in abatement, referred to in Paragraph VI of said complaint, was not filed within the time required by Law, and was never passed upon, nor approved by, said Collector of Internal Revenue.

And for a fifth, further, separate and distinct defense to said first alleged cause of action set forth in said complaint, this defendant alleges that on or about the 15th day of January, 1930, this defendant made an offer of compromise to the Commissioner of Internal Revenue of his alleged liability upon the four instruments which are the basis of the four causes of action set forth in plaintiff's complaint, copies of which instruments are annexed thereto as Exhibits "A," "B," "C" and "D," and that said Commissioner of Internal Revenue, on the 7th day of February, 1930, accepted the sum of one hundred (100) dollars from this defendant in full settlement of all claims against this defendant, arising upon, or out of said four bonds. [29]

II.

Answering the second cause of action set forth in said complaint, this defendant denies and alleges as follows:

1. Answering the allegations in paragraph marked VII of the second cause of action set forth in said complaint, this defendant admits the execution by him of the instrument referred to as a bond

in said paragraph marked VII, a copy of which is annexed to said complaint and marked Exhibit "B," but denies that there was any consideration for the execution of said instrument by this defendant; and denies that the appeal referred to in said instrument was ever taken and perfected by said C. A. Hader; and further alleges that said appeal so alleged therein to have been taken by said defendant Hader, was never perfected, and was dismissed as having been prematurely taken, and the said purported bond, Exhibit "B," never became operative, and did not stay, nor prevent, the enforcement or immediate collection by the Collector of Internal Revenue of Taxes, or Deficiency Taxes, claimed to be due from, or assessed against, said defendant, C. A. Hader.

2. This defendant denies that the sum of thirteen hundred twenty-three and 11/100 (1323.11) dollars, or any part or portion thereof, or any other sum, is now, or ever became due or owing from this defendant to the plaintiff herein, or to said Commissioner of Internal Revenue, or to said Collector of Internal Revenue, either under or in accordance with the terms of said bond, Exhibit "B," or otherwise, or at all; and further denies that any interest is now, or ever became due, owing or unpaid by this defendant either in accordance with the terms of said bond, Exhibit "B," or otherwise, or at all; denies that said, or any, promise contained in said bond, Exhibit "B," or otherwise, or elsewhere, ever became or is now, absolute; and denies that there has accrued to plaintiff an action, [30] or any action,

to demand of this defendant on said bond, or otherwise, or at all, the sum of thirteen hundred twenty-three 11/100 (1323.11) dollars, or any part or portion thereof, or any other sum, or any interest thereof, or upon any other sum, at the rate of twelve (12) per cent per annum, or any other rate per cent per annum, from May 15th, 1925, or from any other date, or otherwise, or at all.

And for a second, further, separate and distinct defense to said second alleged cause of action, this defendant alleges that the cause of action therein set forth against this defendant is barred by the provisions of Section 791, Title 28 of the United States Code.

And for a third, further, separate, and distinct defense to said second alleged cause of action, this defendant alleges that said alleged bond, Exhibit "B," was not filed at the time required by Law, and that it was never accepted or approved by said Collector of Internal Revenue as required by Law.

And for a fourth, further, separate, and distinct defense to said second alleged cause of action set forth in said complaint, this defendant alleges that the claim in abatement, referred to in paragraph marked VII of said complaint, was not filed within the time required by Law, and was never passed upon, nor approved by, said Collector of Internal Revenue.

And for a fifth, further, separate, and distinct defense to said second alleged cause of action set forth in said complaint, this defendant alleges that on or about the 15th day of January, 1930, this de-

fendant made an offer of compromise [31] to the Commissioner of Internal Revenue of his alleged liability upon the four instruments which are the basis of the four *cause* of action set forth in plaintiff's complaint, copies of which instruments are annexed thereto as Exhibits "A," "B," "C," and "D," and that said Commissioner of Internal Revenue, on the 7th day of February, 1930, accepted the sum of one hundred (100) dollars from this defendant, in full settlement of all claims against this defendant, arising upon, or out of said four bonds.

III.

Answering the third cause of action set forth in said complaint, this defendant denies and alleges as follows:

1. Answering the allegations in paragraph marked VI of the third cause of action set forth in said complaint, this defendant admits the execution by him of the instrument referred to as a bond in said paragraph marked VI, a copy of which is annexed to said complaint and marked Exhibit "C," but denies that there was any consideration for the execution of said instrument by this defendant; and denies that the appeal referred to in said instrument was ever taken and perfected by said C. A. Hader; and further alleges that said appeal so alleged therein to have been taken by said defendant Hader, was never perfected, and was dismissed as having been prematurely taken, and the said purported bond, Exhibit "C," never became operative, and did not stay, nor prevent, the enforcement or immediate collection by the Collector

of Internal Revenue of Taxes, or Deficiency Taxes, claimed to be due from, or assessed against, said defendant, C. A. Hader.

2. This defendant denies that the sum of nine hundred forty-seven and 71/100 (947.71) dollars, or any part or portion thereof, or any other sum, is now, or ever became due or owing [32] from this defendant to the plaintiff herein, or to said Commissioner of Internal Revenue, or to said Collector of Internal Revenue, either under or in accordance with the terms of said bond, Exhibit "C," or otherwise, or at all; and further denies that any interest is now, or ever became due, owing or unpaid by this defendant either in accordance with the terms of said bond, Exhibit "C," or otherwise, or at all; denies that said, or any, promise contained in said bond, Exhibit "C," or otherwise, or elsewhere, ever became, or is now, absolute; and denies that there has accrued to plaintiff an action, or any action, to demand of this defendant on said bond, or otherwise, or at all, the sum of nine hundred forty-seven and 71/100 (947.71) dollars, or any part or portion thereof, or any other sum, or any interest thereof, or upon any other sum, at the rate of twelve (12) per cent per annum, or any other rate per cent per annum, from May 15th, 1925, or from any other date, or otherwise, or at all.

And for a second, further, separate, and distinct defense to said third alleged cause of action, this defendant alleges that the cause of action therein set forth against this defendant is barred by the

provisions of Section 791, Title 28, of the United States Code.

And for a third, further, separate, and distinct defense to said third alleged cause of action, this defendant alleges that said alleged bond, Exhibit "C," was not filed at the time required by law, and that it was never accepted or approved by said Collector of Internal Revenue as required by law.

And for a fourth, further, separate, and distinct defense to said third alleged cause of action set forth in said [33] complaint, this defendant alleges that the claim in abatement, referred to in paragraph marked VI of said complaint, was not filed within the time required by law, and was never passed upon, nor approved by, said Collector of Internal Revenue.

And for a fifth, further, separate, and distinct defense to said third alleged cause of action set forth in said complaint, this defendant alleges that on or about the 15th day of January, 1930, this defendant made an offer of compromise to the Commissioner of Internal Revenue of his alleged liability upon the four instruments which are the basis of the four causes of action set forth in plaintiff's complaint, copies of which instruments are annexed thereto as Exhibits "A," "B," "C" and "D," and that said Commissioner of Internal Revenue, on the 7th day of February, 1930, accepted the sum of one hundred (100) dollars from this defendant in full settlement of all claims against this defendant, arising upon, or out of said four bonds.

IV.

Answering the fourth cause of action set forth in said complaint, this defendant denies and alleges as follows:

1. Answering the allegations in paragraph marked VII of the fourth cause of action set forth in said complaint, this defendant admits the execution by him of the instrument referred to as a bond in said paragraph marked VII, a copy of which is annexed to said complaint and marked Exhibit "D," but denies that there was any consideration for the execution of said instrument by this defendant; and denies that the appeal referred to in said instrument was ever taken and perfected by said C. A. Hader; and further alleges that said appeal so alleged therein to have been taken by said defendant Hader, was never perfected, and was dismissed as having been prematurely taken, and the [34] said purported bond, Exhibit "D," never became operative, and did not stay, nor prevent, the enforcement or immediate collection by the Collector of Internal Revenue of taxes, or deficiency taxes, claimed to be due from, or assessed against, said defendant, C. A. Hader.

2. This defendant denies that the sum of six hundred seventy and 80/100 (670.80) dollars, or any part or portion thereof, or any other sum, is now, or ever became due or owing from this defendant to the plaintiff herein, or to said Commissioner of Internal Revenue, or to said Collector of Internal Revenue, either under or in accordance with the terms of said bond, Exhibit "D," or otherwise, or at all; and further denies that any interest is

now, or ever became due, owing or unpaid by this defendant either in accordance with the terms of said bond, Exhibit "D," or otherwise, or at all; denies that said, or any, promise contained in said bond, Exhibit "D," or otherwise, or elsewhere, ever became, or is now, absolute; and denies that there has accrued to plaintiff an action, or any action, to demand of this defendant on said bond, or otherwise, or at all, the sum of six hundred seventy and 80/100 (670.80) dollars, or any part or portion thereof, or any other sum, or any interest thereof, or upon any other sum, at the rate of twelve (12) per cent per annum, or any other rate per cent per annum, from May 15th, 1925, or from any other date, or otherwise, or at all.

And for a second, further, separate, and distinct defense to said fourth alleged cause of action, this defendant alleges that the cause of action therein set forth against this defendant is barred by the provisions of Section 791, Title 28, of the United States Code. [35]

And for a third, further, separate, and distinct defense to said fourth alleged cause of action, this defendant alleges that said alleged bond, Exhibit "D," was not filed at the time required by law, and that it was never accepted, or approved, by said Collector of Internal Revenue, as required by law.

And for a fourth, further, separate, and distinct defense to said fourth alleged cause of action set forth in said complaint, this defendant alleges that the claim in abatement, referred to in paragraph marked VI of said complaint, was not filed

within the time required by law, and was never passed upon, nor approved by, said Collector of Internal Revenue.

And for a fifth, further, separate, and distinct defense to said fourth alleged cause of action set forth in said complaint, this defendant alleges that on or about the 15th day of January, 1930, this defendant made an offer of compromise to the Commissioner of Internal Revenue of his alleged liability upon the four instruments which are the basis of the four causes of action set forth in plaintiff's complaint, copies of which instruments are annexed thereto as Exhibits "A," "B," "C," and "D," and that said Commissioner of Internal Revenue, on the 7th day of February, 1930, accepted the sum of one hundred (100) dollars from this defendant in full settlement of all claims against this defendant, arising upon, or out of said four bonds.

Further answering said complaint and the allegations thereof, this defendant denies that the sum of forty-seven hundred fifty-three and 65/100 (4753.65) dollars, or any part or [36] portion thereof, or any other sum, either with or without interest at the rate of twelve (12) per cent per annum, or at any other rate, is due from this defendant to the plaintiff from May 15th, 1925, or from any other date, or at all.

WHEREFORE, this defendant prays that he be hence*d* dismissed with judgment for his costs of suit.

Dated March 26th, 1931.

HARRY F. SULLIVAN,
Attorney for Wm. L. Hughson,
718 Humboldt Bank Building,
San Francisco, California.

State of California,
City and County of San Francisco,—ss.

William L. Hughson, being first duly sworn, says that he is one of the defendants in the above-entitled action, that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

WILLIAM L. HUGHSON.

Subscribed and sworn to before me this 26th day of March, 1931.

[Seal] JOHN WISNOM,
Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of a copy of the within answer is admitted this 26th day of March, 1931.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 26, 1931. [37]

(Title of Court and Cause.)

WAIVER OF JURY.

It is hereby stipulated and agreed that this case may be tried by the court sitting without a jury.

July 17, 1931.

GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States Attorney,
(Attorneys for Plaintiff).
HARRY F. SULLIVAN,
(Attorney for Defendant, Wm. L. Hughson).

[Endorsed]: Filed Jul. 18, 1931. [38]

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause came regularly on for trial on July 27, 1931, before the above-entitled court, Honorable Harold Louderback, presiding, sitting without a jury, a written waiver of jury being filed in the records of the case. The plaintiff was represented by Geo. J. Hatfield, United States Attorney, and Esther B. Phillips, Assistant United States Attorney, defendant W. L. Hughson being represented by Harry F. Sullivan, defendant Carl A. Hader not appearing. Evidence oral and documentary was introduced. The Court,

having considered the same and the arguments of counsel, now makes the following

FINDINGS OF FACT.

I.

The allegations of Paragraphs I, II, III, IV, V, and VI of the plaintiff's first, second, third and fourth causes of action are true. That on or about August 18, 1925, the defendant Wm. L. Hughson and the defendant Carl A. Hader duly signed and executed bonds for the payment of taxes previously assessed against Carl A. Hader, true and correct copies of said bonds being attached to the complaint as Exhibits "A," "B," "C," and "D."

II.

On or about August 18, 1925, said bonds were delivered to John P. McLaughlin, United States Collector of Internal Revenue at San Francisco, and were duly accepted by said Collector and his superiors. They were given in consideration of the matters referred to in the bonds, and in consideration of extension of time for payment, and in consideration [39] of said Collector refraining from enforcing immediate payment of the taxes referred to in said bonds. Relying on the bonds, the Collector made no further effort to collect the taxes referred to in the bonds and in the complaint. No property was seized upon in distraint proceedings and no effort to *d*estrain was made after said bonds were given.

III.

The allegations of Paragraph VIII of plaintiff's

first, second, third and fourth causes of action are true.

IV.

The plaintiff has done all things required of it to be done under and by the terms and conditions of the bonds in suit. No part of the taxes referred to in the bonds has been paid. The defendants have wholly failed and refused to pay any part of the amount due under each of said bonds.

V.

On January 15, 1930, the defendant Hughson by his attorney, sent to the General Counsel, Bureau of Internal Revenue, a written offer in compromise of his total liability under the four bonds in suit, in the sum of one hundred dollars, attaching to the offer a check for $100, payable to the Commissioner. The check was endorsed by the Commissioner to the Collector, and with the offer was sent to the Collector for having the offer made in a new form. Defendant Hughson, at the Collector's request, on February 4, 1930, signed a new offer of compromise. The Collector cashed the check on or about February 7, 1930, and deposited the money in a special account and sent the offer to the Commissioner with his recommendation. In April, 1930, the Commissioner rejected the offer in compromise. The defendant Hughson was notified of the rejection and was tendered the sum which he had previously deposited for the compromise, such tender being made by [40] the Collector in accordance with the rules and regulations of the Bureau of Internal Revenue and of the customs and practice of the Collector's office.

The defendant Hughson refused to accept the return of his deposit but is entitled to recover it upon application to the Collector or the Commissioner.

From the foregoing facts the court states these

CONCLUSIONS OF LAW.

First Cause of Action.

1. That the plaintiff is entitled to recover from the defendant Hughson the sum of $1812.03, with interest thereon at 6% from May 15, 1925, to July 15, 1928, and thereafter at the rate of 12% per annum.

Second Cause of Action.

2. That the plaintiff is entitled to recover from the defendant Hughson the sum of $1323.11, with interest at 6% from May 15, 1925, to July 15, 1928, and thereafter at the rate of 12% per annum.

Third Cause of Action.

3. That the plaintiff is entitled to recover from the defendant Hughson, the sum of $947.71, with interest at 6% from May 15, 1925, to July 15, 1928, and thereafter at the rate of 12% per annum.

Fourth Cause of Action.

4. That the plaintiff is entitled to recover from the defendant Hughson, the sum of $670.80, with interest thereon at 6% from May 15, 1925, to July 15, 1928, and thereafter at the rate of 12% per annum, together with costs of suit herein incurred.

HAROLD LOUDERBACK,
United States District Judge.

Service of the within proposed findings by copy admitted this 15th day of August, 1931.

HARRY F. SULLIVAN,
Attorney for Deft. Hughson.

[Endorsed]: Filed Aug. 21, 1931. [41]

[Title of Court and Cause.]

EXCEPTIONS TO FINDINGS.

Now comes the defendant William L. Hughson, and respectfully presents and takes the following exceptions to the findings of fact duly given, made and signed by Hon. Harold J. Louderback, United States District Judge in the above-entitled court.

1. Said defendant excepts to that portion of Finding "I" wherein said Court finds that the allegations of Paragraph "VI" in each of the four causes of action in plaintiff's complaint, are true for the reason that there is no allegation in either of said four causes of action in said complaint, alleging that any order, assessment, or determination, had been made at the time defendant Hader filed his appeal, from which an appeal could be taken.

2. Said defendant excepts to that portion of Finding "II" of the findings of said Court, and in particular that portion thereof wherein the Court finds that the four bonds referred to in the four causes of action in said complaint, were accepted by the Collector and his superiors, on the ground that there was no allegation in either of the four causes

of action in plaintiff's complaint to the effect that said four bonds were accepted. [42]

3. Said defendant excepts to that portion of Finding "II," wherein the Court finds that said four bonds were given for a consideration, for the reason that each of said four bonds were predicated upon the belief that an appeal had been filed and perfected by defendant Hader, whereas there was no order or determination of the Commissioner of Internal Revenue from which said Hader had any right to take an appeal.

4. Said defendant excepts to that portion of Finding "IV," wherein said Court finds that no part of the taxes referred to in the bonds, has been paid, for the reason that there was no allegation in plaintiff's complaint that said taxes were not paid after July 14th, 1928, and prior to January 7th, 1931, the date on which the complaint was filed herein.

5. Said defendant excepts to the action of said Court in failing to find that the Commissioner of Internal Revenue accepted one hundred (100) dollars from defendant Hughson, on or about the 7th of February, 1930, in compromise of plaintiff's claims, based upon the four bonds in suit; and in failing to find that the cashing of said check for one hundred (100) dollars, on February 7th, 1930, constituted an acceptance of an offer of compromise, theretofore made by said defendant Hughson.

6. Said defendant Hughson excepts to the action of the Court in failing to find that each of the four causes of action set forth in plaintiff's complaint

was barred by the provisions of section 791, article 28, of the United States Code.

7. Said defendant Hughson excepts to the conclusion of said Court to the effect that plaintiff is entitled to recover interest at the rate of twelve per cent from and after July 15, 1928.

Dated August 31st, 1931.

WILLIAM L. HUGHSON,
Defendant.
HARRY F. SULLIVAN,
Attorney for Defendant.

Foregoing exceptions allowed.

HAROLD LOUDERBACK,
U. S. District Judge.

[Endorsed]: Filed Sep. 15, 1931. [43]

In the Southern Division of the United States District Court for the Northern District of California.

No. 18,880–L.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL A. HADER and WILLIAM L. HUGHSON,
Defendants.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial upon the 27th day of July, 1931, before the Court

sitting without a jury, a trial by jury having been waived by written stipulation filed; Esther B. Phillips, Assistant U. S. Attorney, appearing as attorney for plaintiff, and Harry F. Sullivan, Esquire, appearing as attorney for defendants, and oral and documentary evidence having been introduced and closed, and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having rendered its decision and filed its findings and ordered that judgment be entered herein in favor of plaintiff in, accordance with said findings:

NOW, THEREFORE, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that United States of America, plaintiff, do have and recover of and from William L. Hughson, said defendant, the sum of $1812.03 on the first cause of action, $1323.11 on the second cause of action, $947.71 on the third cause of action, and $670.80 on the fourth cause of action, making a total of $4,753.65, with interest at six per cent (6%) from May 15, 1925, to July 14, 1928, and thereafter interest at the rate of twelve per cent (12%) per annum until paid; together with its costs herein expended taxed at $27.00.

Judgment entered this 21st day of August, 1931.

WALTER B. MALING,

Clerk. [44]

[Title of Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT.

To Defendant Wm. L. Hughson and to Harry F. Sullivan, His Attorney:

Please take notice that findings of fact and conclusions of law were this day signed by the Court, and judgment thereon entered in plaintiff's favor.

Dated: August 21, 1931.

GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney.

Service of the within notice, etc., by copy admitted this 21st day of August, 1931.

HARRY F. SULLIVAN,
Attorney for Deft. Hughson.

[Endorsed]: Filed Aug. 21, 1931. [45]

[Title of Court and Cause.]

DEFENDANTS' PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 27th day of July, 1931, before the above-entitled court, at San Francisco, California, Hon. Harold J. Louderback, Judge of said court presiding, a jury trial having been duly waived the above-entitled cause came on to be heard, Hon. George J. Hatfield, United States

(Testimony of John P. McLaughlin.)

Attorney, and Miss Esther Phillips, Assistant United States Attorney, appearing for the plaintiff, and Harry F. Sullivan, Esq., appearing for defendant, William L. Hughson, and defendant Carl A. Hader, neither appearing in person, nor by attorney, the following proceedings were had, to wit:

TESTIMONY OF HON. JOHN P. McLAUGHLIN, FOR PLAINTIFF.

Hon. JOHN P. McLAUGHLIN produced sworn and examined as a witness for the plaintiff, and testified as follows:

Direct Examination.

To Miss PHILLIPS.—I am now, and ever since November 21, 1921, have continuously been Collector of Internal Revenue for the First Collection District in San Francisco, California.

Miss PHILLIPS.—Q. "Mr. McLaughlin, I now show you a certified copy of an assessment certificate against Mr. Carl [46] A. Hader, for various amounts covering several years. I would like to have you look at that and tell me when that assessment certificate came to your office, if you know. You can refresh your recollection with it."

"Mr. SULLIVAN.—I desire at this time to make an objection to this testimony sought to be elicited by this question, and all questions along the same line, that they are absolutely irrelevant, immaterial, and incompetent, so far as the defendant Hughson is concerned, in that Hughson was not a party to any

(Testimony of John P. McLaughlin.)

proceedings concerning which that certified copy was filed with the Collector of Internal Revenue at San Francisco. The action is an action upon certain bonds. I think that the Government is limited in proving its cause of action to the facts set forth in the bond. There is no allegation in the bond attached to the complaint in this case which deals with the question of assessment, at all."

"Miss PHILLIPS.—It is merely preliminary. The action is upon a bond, but refers to the tax liability of the defendant Hader."

"The COURT.—In other words, you want to show the fact there was a tax liability?"

"Miss PHILLIPS.—Exactly, and particularly the consideration which the Collector gave after this bond had been filed in withholding collection."

"The COURT.—I will overrule the objection."

"Mr. SULLIVAN.—Exception."

EXCEPTION No. 1.

WITNESS.—A. "This was received at the office in May, 1925."

WITNESS.—(Continuing.) This was a jeopardy assessment, and demand was made and warrant of distraint issued immediately. I had dealings with Mr. Hader personally in regard to the assessment at the time he filed his claims in abatement. Hader on June 8, 1925, filed claims in abatement, which were rejected on March [47] 5, 1928. At the time of filing his claims in abatement, Mr. Hader tendered a bond. It was in the wrong form. I re-

(Testimony of John P. McLaughlin.)
turned it to him, telling him why I was returning it. I myself have charge of the acceptance or rejection of bonds. I always handle such matters personally. I have no recollection of the exact date on which the bonds in suit were filed with me. The date upon them, August 25, 1925, I think would be right. They were handed to me personally in the office. Between August, 1925, and March, 1928, I made no attempt to collect any tax from Mr. Hader. [48]

Miss PHILLIPS.—"Q. Between the interval of August, 1925, and March, 1928, did you take any steps to collect any tax from Mr. Hader?

A. No, ma'am.

Q. Why not?"

Mr. SULLIVAN.—"I object to that as calling for a conclusion."

Miss PHILLIPS.—"The defendants in this case admit the bond was filed. They deny that any consideration was given because of the filing of this bond. I am now proving that because this bond was filed the Collector made no efforts at collection."

The COURT.—"I allow the question."

Mr. SULLIVAN.—"Exception."

EXCEPTION No. 2.

A. "The fact that I had bonds which covered the claims, and that the claims were pending, and until the claims were rejected there should be no action. After that we could preceed at any time. We had to."

(Testimony of John P. McLaughlin.)

Mr. SULLIVAN.—I ask that that portion of the answer in which he said he had "bonds which covered the claim" be stricken out as calling for the conclusion of the witness.

The COURT.—"You mean that the bond that you believe covered the claim?"

A. "Yes."

"Q. And that was the reason why you were not proceedings at that time? A. Exactly."

The COURT.—"I think the record now shows what he meant by that matter."

The Court failed to make any order passing on defendants motion to strike out that portion of the answer above referred to.

Cross-examination.

To Mr. SULLIVAN, Witness.—The four warrants of distraint, one for each of the four separate years involved, were issued [49] on May 15th, 1925. I have copies of these warrants in my hand.

Thereupon defendant offered said four copies of said warrants in evidence, and they were all admitted in evidence and marked Defendant's Exhibit No. 1.

WITNESS.—(Continuing.) These warrants were never withdrawn.

Thereupon counsel for plaintiff offered in evidence certified copy of assessment-roll showing deficiency tax assessed against Carl A. Hader, defendant herein.

(Testimony of John P. McLaughlin.)

Mr. SULLIVAN.—"I make the same objection to the offer of that in evidence at the present time, as I made when the witness was asked about it on direct examination."

The COURT.—"The objection will be overruled."

Mr. SULLIVAN.—"Exception."

EXCEPTION No. 3.

Thereupon said assessment-roll was admitted in evidence and marked Plaintiff's Exhibit No. 1.

Thereupon plaintiff rested.

TESTIMONY OF DAVID BARRY, FOR DEFENDANT HUGHSON.

DAVID BARRY, a witness, produced, sworn, and examined on behalf of defendant Hughson, testified as follows:

To Mr. SULLIVAN.—My name is David Barry, and I am employed as a clerk by the Hibernia Savings & Loan Society. I have here a check dated January 15, 1930, which is in the words and figures following, to wit:

> "No. 573969, San Francisco, Calif., January 15, 1930, No. 657. The Hibernia Savings & Loan Society Pay to the Commissioner of Internal Revenue or order $100. Pay One Hundred and No Cents Dollars. W. L. Hughson. Certified, The Hibernia Savings & Loan Society, February 6, 1930. Good when properly endorsed, Hibernia Savings & Loan Society, L. O'Grady." [50]

(Testimony of David Barry.)

WITNESS.—(Continuing.) This check bears the following endorsements—

"Pay to the order of the Collector of Internal Revenue without recourse, 14544. Certified by Robert H. Lucas."

"Pay to the order of the Federal Reserve Bank of San Francisco, California, February 6, 1930, John P. McLaughlin, Collector of Internal Revenue, John P. McLaughlin."

"Received payment CCC February 7, 1930, Federal Reserve Bank of San Francisco."

WITNESS.—(Continuing.) Across the face of the check is the stamp—

"Paid, The Hibernia Savings & Loan Society, San Francisco, February 7, 1930."

TESTIMONY OF DEFENDANT WILLIAM L. HUGHSON, IN HIS OWN BEHALF.

WILLIAM L. HUGHSON, one of the defendants, was produced, sworn and examined as a witness on his own behalf, and testified as follows:

Direct Examination.

To Mr. SULLIVAN.—On or about January 15th, 1930, I signed the original of the document now shown to me, and made out my personal check for $100.00 payable to the Commissioner of Internal Revenue.

Thereupon, on behalf of defendant Hughson, Mr. Sullivan offered said document in evidence, and the

(Testimony of William L. Hughson.)

same was received, without objection, and marked, Defendant's Exhibit No. 3.

WITNESS.—(Continuing.) Neither the United States, nor any officer of the United States, nor the Collector of Internal Revenue, nor the Commissioner of Internal Revenue, nor the Treasurer of the United States, ever gave back, or returned to me, the one hundred dollar check which has been offered in evidence here, nor was any sum of $100.00 ever paid to me by the Government thereafter under the claim that it was the same $100.00 that I deposited with the Government as shown by said check, on the Hibernia Savings & Loan Society.

Cross-examination.

To Miss PHILLIPS.—Shortly after a letter of April, 1930, in which [51] I was notified the offer of compromise was rejected, Mr. McLaughlin, the Collector, offered me $100.00. I declined to accept the $100.00 on advice of counsel. After I signed the offer of compromise, dated January 15th, 1930, I gave it to Mr. Sullivan. I do not remember any letter, or telephone conversation with the Collector's office about the 4th, 5th, or 6th of February, 1930, regarding this offer of compromise.

Thereupon the witness identified his signature on a document marked "Offer in compromise, Form 656," which said document was thereupon marked Plaintiff's Exhibit 1 for Identification.

Thereupon defendant Hughson offered, and there was admitted in evidence without objection, a let-

(Testimony of John P. McLaughlin.)

ter dated January 8th, 1930, addressed to Harry F. Sullivan, and signed by Mr. Charest of the General Counsel's Office, Bureau of Internal Revenue, Washington, D. C., and a letter dated January 15th, 1930, sent by Harry F. Sullivan to the General Counsel's Office, Bureau of Internal Revenue, Washington, D. C. Both of said letters were marked Defendant's Exhibit No. 4.

Thereupon defendant Hughson rested.

TESTIMONY OF JOHN P. McLAUGHLIN, FOR PLAINTIFF (RECALLED IN REBUTTAL).

JOHN P. McLAUGHLIN, recalled on behalf of plaintiff, rebuttal, testified as follows:

To Miss PHILLIPS.—Mr. Hughson's check for $100.00, together with the offer of compromise, Defendant's Exhibit No. 3, was sent to me by the Commissioner at Washington with a request to have Form No. 656 executed. Mr. Hughson was advised to that effect, and this Form No. 656, marked Plaintiff's Exhibit No. 1 for Identification, was sent to Mr. Hughson, and he executed it. Then the offer was accepted, and the $100.00 was placed in my special deposit account pending action by the [52] Department on the offer in compromise. When the offer was rejected, I tendered, by telephone, the check to Mr. Hughson, and he refused to accept it. It is more than likely that we filled out Form 656, and sent it to Mr. Hughson to sign. Subsequently, I received back from Mr. Hughson,

(Testimony of John P. McLaughlin.)

with his signature on it, Form 656, which is the document marked Plaintiff's Exhibit No. 1 for Identification, and I kept his check for $100.00. In depositing the money in a special account pending action on the offer in compromise I followed the customary procedure of my office.

Thereupon said Plaintiff's Exhibit No. 1 for Identification was offered in evidence, and defendant Hughson objected thereto upon the ground that it was immaterial, irrelevant, and incompetent so far as defendant Hughson was concerned; that it was not a part of the original offer which was made by Hughson on the 15th of January, 1930, and therefore could not modify and vary in any way, or form the offer made by Hughson on the 15th of January, 1930, with which the $100.00 check was sent back to Washington.

Thereupon the Court overruled said objection, and said document was admitted in evidence and marked Defendant's Exhibit No. 2.

Mr. SULLIVAN.—Exception.

EXCEPTION No. 4.

Cross-examination.

To Mr. SULLIVAN.—My records show that a check was drawn on May 12th, 1930, for $100.00, in favor of W. L. Hughson, and was returned to the Commissioner on November 24th, 1930.

Thereupon plaintiff moved for a judgment according to the prayer on the complaint on the four causes of action. The case was thereupon submitted upon briefs to be thereafter filed. [53]

BE IT FURTHER REMEMBERED that thereafter, defendant, Hughson, through his attorney, in presenting his brief, moved for a judgment in favor of defendant Hughson. [54]

PLAINTIFF'S EXHIBIT No. 1.

UNITED STATES OF AMERICA.
TREASURY DEPARTMENT,
WASHINGTON.

January 17, 1931.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States) I hereby certify that the annexed are true copies of Assessment Certificate and that portion of the May, 1925, Special #9, Income Tax Assessment list—1st California collection district—showing additional assessments of $1,208.02, $882.07, $631.81 and $447.20 and penalty in the amounts of $604.01, $441.04, $315.90 and $223.60, for the years 1920, 1921, 1922, and 1923, respectively against Carl O. Hader, San Francisco, California, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By Direction of the Secretary of the Treasury:
(Seal) F. A. BIRGFELD, (Signed)
F. A. BIRGFELD,
Chief Clerk, Treasury Department.

MK W.M. BAMR ETK R E S C M C B
[55]

ASSESSMENT CERTIFICATE.

1st District of California. Month—May. Special #9. Year—1925.

Additional Assessments

Income Tax Division,————,

Chief of Division.

Lists as to tax and payments compared and found to agree with control ledger.

————————,

Bookkeeper.

I HEREBY CERTIFY that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names, and that the amounts thereof are as follows:

Dated at ————.

Office of Collector of Internal Revenue.————, 192—.

————————,

Collector of Internal Revenue.

List Returns Filed	Excess Collections	Total Tax
	Personal	4 808.10
Totals reported by collector.		
Differences found by commissioner.		
Items reported by commissioner.		
Total Assessment		4 808.10

I HEREBY CERTIFY that I have made inquiries, determinations and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amount of taxes, pen-

alties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals, firms and corporations opposite whose names such amounts are placed and the *the* amount chargeable to the collector is as above.

D. W. BLAIR, (Sgd.)
Commissioner of Internal Revenue.

Dated at Washington, D. C.

Office of Commissioner of Internal Revenue, May 14th, 192—. [56]

INSTRUCTIONS.
JB JJM WLM MS.

This form must be made each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within ten days after the close of the month. One copy of this certificate (Form 23C) will be returned to the Collector accompanied by a statement of differences on Form 23D, (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner.

ASSESSMENT LIST.

District. 1st California Income Tax List. May, 1925. Special No. 9.

		Date.	Debit.	Credit.	New Balance.	Remarks.
0	Hader Carl O		1208 02			
	San Francisco	Pen	604 01	1812 03		1920 1040 0A
	Calif.					Dummy Sec 274I
	May OO P SPL NO 9					Tele Asst
1	Hader Carl O					
	San Francisco		882 07			
	Calif	Pen	441 04	1323 11		1921 1040 0A
						Dummy Sec 274I
						Tele Asst
	May 01 P Spl No 9					
2	Hader Carl O					
	San Francisco	631 81				
	Calif.	Pen	315 90	947 71		1922 1040 0A
						Dummy Sec 274I
						Tele Asst
	May 02 P. Spl No. 9.					
3	Hader Carl O					
	San Francisco, Calif		447 20			
		Pen	223 60	670 80		1923 1040 0A
						Dummy Sec 274D
						Tele Asst
	May 03 P. Spl No. 9					

[57]

PLAINTIFF'S EXHIBIT No. 2.

Form 656—Revised
March, 1929
TREASURY
DEPARTMENT
Internal Revenue
Service

OFFER IN COMPROMISE

FOR USE OF COLLECTOR

Class of tax .....

Special deposit account No. .....

Serial No. .....

Amount paid, $ .....

(Cashier's stamp)

Certified Check.
Cash. M. O.

To be filed with collector for your district

Forms to be submitted in duplicate

William L. Hughson—

(Name of taxpayer)

Market & 11th Sts., San Francisco—Calif.

(Address of taxpayer)

Date Jan. 30, 1930.

Commissioner of Internal Revenue:

Through the Collector of Internal Revenue
at San Francisco—California.

Sir:

The following offer in compromise is submitted to you by the undersigned:

Charges of violation of law or failure to meet an internal revenue obligation have been made against the taxpayer named above as follows: In settlement of Income Tax liability of Carl O. Hader

(State specifically the pending charge and/or kind of tax and period involved)

for the years 1920 to 1924, inclusive.

.....

Date and place of alleged violation Jan. 25, 1930, San Francisco–x Calif.

The alleged violation or failure is due to the following cause or causes: See attached statement.

(State in detail)

.....

The sum of $100.00 is hereby tendered voluntarily with request that it be accepted as a com-

promise offer and that release be granted the undersigned from the following liability resulting from the violation or failure specified:

. . . . . .

The following facts and reasons are submitted as grounds for acceptance of the offer: As per statement attached hereto.

. . . . . .

(If space provided is insufficient, attach supplemental affidavit and supporting evidence)

It is understood that this *offer* does not afford relief from the liability incurred unless and until it is actually accepted by the Commissioner with the advice and consent of the Secretary of the Treasury, and for cases in suit with the recommendation of the Attorney General of the United States, costs, if any, to be paid by the undersigned.

In making this offer, and as a part of the consideration thereof, the taxpayer hereby expressly agrees that all payments and other credits heretofore made to the account(s) for the year(s) under consideration, for which an unpaid liability exists, shall be retained by the United States, and, in addition, the taxpayer hereby expressly waives—

1. Any and all claims to refunds or overpayments to which he may be entitled under the internal revenue laws for any years, calendar or fiscal, or any period fixed by law, expiring prior to the date of acceptance of the offer, due through overpayment of any tax, interest, or penalty, or interest on overpayments or otherwise, as is not in excess of the difference between the tax liability sought to be compromised herewith and the amount

herein offered, and agrees that the United States may retain such refunds or overpayments, if any.

2. The benefit of any statute of limitations affecting the collection of the liability sought to be compromised, and in the event of the rejection of the offer, expressly consents to the extension of any statute of limitations affecting the collection of the liability sought to be compromised by the period of time (not to exceed two years) elapsed between the date of the filing of this offer and the date on which final action thereon is taken.

.....

(If offer is made by agent, the reason therefor must be stated on this line)

(Signed) W. L. HUGHSON,

(Signature of taxpayer or agent)

.....

(Address of agent)

Sworn and subscribed before me this 4th day of February, 1930.

(Signed) NEVA A. KEMPER, Notary Public.

(Signature of officer administering oath)

Waiver of statute of limitations is hereby accepted, and offer will be considered and acted upon in due course.

....., Commissioner of Internal Revenue.

By ....., Collector of Internal Revenue.

COLLECTOR'S RECOMMENDATION.

Rejected Schedule.
#2556 4/23/30.

Commissioner of Internal Revenue, Washington, D. C.:

Herewith is an offer made by William L. Hughson, 11th & Market Sts., S. F. Cal., in compromise of liability incurred because In settlement of Income Tax liability of Carl O. Hader for the years 1920 to 1924, inclusive.

Return was filed on Form 1040 for 1920 to 1924
(Period)
incl., on May, 1925.
(Date)

This case is (not) in suit.

Record of Assessments and Payments,

Entries in detail to be made by the Collector. Show in the tenth column by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in eighth column.

Kind of Assessment, Tax, Penalty, Interest, and Taxable Year	List	Year	Month	Account No. or Amount Assessed Page Line	Paid, Abated, or Credited Date Amount	Balance Due	Pd) Ab.) Cr.)	Schedu Numb
Income-'20	Comm.	1925	May	00-P-Sp.#9-		$1812 03	IT	#18-
1921	"	1925-	"	01-P-Sp.#9-		1323 11	"	#18-
1922	"	1925-	"	02-P-Sp.#9-		947 71	"	#18-
1923	"	1925-	"	03-P-Sp.#9-		670 80	"	#18-

See memo. attached for original assessment on above accounts.

Offer in compromise in lieu of outstanding liability for 1920—to 1924—incl.

COMPROMISE OFFER. DEMANDS ISSUED

Amount of previous tender.$..... Form 17—Date 5/15/25
Amount of this tender....$100.00 69— 2/18/28—
Total amount offered.....
Was a notice of lien filed?.....
(If so, when and where)
Was a bond for collection filed?
(If so, furnish copy of same)
Was a collection waiver filed?.....
(If so, furnish copy of same)
I recommend that the offer be Rejected for the
(Accepted or rejected)
following reasons (state same in full):
Date signed Feb. 10th, 1930.

....,
Collector.....District of 1st Calif.

MEMO. OF ACCOUNT OF CAROL O. HADER.
Carl. O. Hader—

	Tax. Paid; Bal. Due.
c/o Wm. L. Hughson....$1208.02	
San Francisco-Calif. Pen. 604.01	$1812.03

1925—May 00–P–Sp. #9—

1920—1040—0A. Sec. 274—D.

Tax. Paid; Bal. Due.

Carl. O. Hader—
San Francisco-Calif. ....$ 882.07
Pen..... 441.04 $1323.11

1925—May 01—P. Sp. #9—

1921—1040—0A. Sec. 274—D.

Tax. Paid; Bal. Due.

Carl. O. Hader—
San Francisco-Calif. ....$ 631.81
Pen.... 315.90 $ 947.71

1925—May 02—P. Sp. #9—

1922—1040—0A. Sec. 274—D.

Tax. Paid; Bal. Due.

Carl O. Hader—
San Francisco-Calif. $447.20
Pen..... 223.60 $ 670.80

Total Outstanding—$4753.65—

1925—May 03—P. Sp. #9—

1923—1040—0A. Sec. 274—D.

Forms—17—issued 5/15/25—
Forms—69—issued 2/18/28—[58]

DEFENDANT'S EXHIBIT No. 1.

COPY.

No. 22995.

WARRANT FOR DISTRAINT.

UNITED STATES OF AMERICA

1st Collection District, State of California

To ————————————,

Deputy Collector.

WHEAEAS, in pursuance of the provisions of the acts of Congress relating to internal revenue the below named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; AND WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same, YOU ARE HEREBY COMMANDED to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes as may be necessary to satisfy the tax or taxes, with 5 per centum additional upon the amount of the tax or taxes, and interest at the rate of 1 per centum per month from the time the tax or taxes became due, and also such further sum as shall be sufficient for

the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixteenth day after the execution hereof. [59]

1. Name—Carl O. Hader.
2. Location—21 Hillway Ave., San Francisco, Calif.
3. Description of Tax:

Add'l 1920 Income
1040 OA Dummy
Sec. 274 D Tele. Asst.
Income Sales Pro-Narc Misc.

Amount of Tax 1812.03
Amount of penalty and interests
Int. 33 mos. at ½%. 298.98

Total tax, penalty and interest $2111.01
Amount of additional interest due from date of issue 2/15/28.

4. Date of Notice and Demand (Form 1–17) 5/15/25 List May, 1925. Serial No. Spl. #9-OOP.

5. Date or Notice and Demand (Form 1–21) List —— Serial No.

Witness my hand and official seal at San Francisco this 18th day of February, 1928.

Signed—JOHN P. McLAUGHLIN,
Collector of Internal Revenue,
1st Internal Revenue Collection, District of California.

Tax $1208.02
Pen. 604.01

$1812.03

(See instructions on reverse side.) [60]

RETURN OF DEPUTY COLLECTOR.

*I hereby certify that, pursuant to the herein warrant of distraint I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all the provisions of law were strictly complied with; that the property was sold at public auction, after due notice, to the highest bidde*s* at the prices herein stated:

1. Date of receipt of warrant————————
2. Date of notice of sale————————
3. Description of property levied upon————
4. Notice of sale:
   By publication in newspaper at————————
   By posting notice at following places————
5. Name of Purchaser————————

*I have not executed the within warrant for the following reasons:

6. Amount received from sale————$————
7. Cost of levy and sale————$————
8. Net Proceeds————$————

The gross proceeds, amounting to $————, are herewith inclosed.

Dated at ————, 192—,

————————,

Deputy Collector.

*Strike out lines inapplicable.

INSTRUCTIONS.

For all warrants of distraint on which it necessary to make seizures and sales the collector will make a docket entry on Record 44, which entry should be substantially a transcript of the schedule on the inside of the warrant. Each warrant should be numbered and the number and name of the deputy to whom issued entered on Form 824. This will enable the collector to readily trace every warrant issued and insure its prompt return. Upon the return of the warrant by the deputy the ent*i*res on Form 824 should be completed, so that it will [61] give a complete history of all proceedings on said warrant, and in case of the sale of real estate, proper ent*i*res should also be made in Record 21. Upon the execution of the warrant it should be properly returned to the collector, with a report showing, in full, what action was taken in each case. A report on Form 210 should be made to the Commissioner of Internal Revenue in all cases where personal property is sold under a warrant for distraint.

Sixty days are deemed ample time for the execution and return of a warrant for distraint by a deputy collector. When report is delayed beyond that time the delinquent deputy should be called on for an explanation of the cause of such delay, and if not satisfactory the collector will require the deputy to execute and return the warrant at once.

When a warrant for distraint is returned with the report of no property found liable to distraint, the deputy so reporting must accompany the return warrant with his affidavit on Form 53.

Attention of distraining officers is called to the following provisions of law: "Provided, That there shall be exempt from distraint and sale, if belonging to the head of a family, the schoolbooks and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding thirty days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools or implements, of a trade or profession, to an amount not greater than one hundred dollars, shall also be exempt; and the officer making the distraint shall summon three disinterested householders of the vicinity, who shall appraise and set apart to the owner the amount of property herein declared to be exempt." [62]

DEFENDANT'S EXHIBIT No. 1.

COPY.

No. 22995.

WARRANT FOR DISTRAINT.

UNITED STATES OF AMERICA,

1st Collection District, State of California.

To ——————————,

Deputy Collector.

WHEREAS, in pursuance of the provisions of the acts of Congress relating to internal revenue the below named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named herein below, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; AND WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same, YOU ARE HEREBY COMMANDED to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes as may be necessary to satisfy the tax or taxes, with 5 per centum additional upon the amount of the tax or taxes, and interest at the rate of 1 per centum per month from the time the tax or taxes became due, and also such further sum as shall be sufficient for

the fees, costs, and expenses of the levy; but if sufficient goods, chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. [63]

1. Name—Carl O. Hader.
2. Location—21 Hillway Ave., San Francisco, Calif.
3. Description of Tax:

Add'l 1921.
1040 0A.
Dummy Sec. 274D.
Tele Asst.
Income Sales Pro-Nard Misc.

Amount of Tax....1323.11
Amount of penalty
and interest 218.31

Total tax, penalty
and interest 1541.42

Amount of additional interest due from date of issue 2/15/28.

4. Date of Notice and Demand (Form 1–17) 5/15/25 List May, 1925. Serial No. Spl. #9–01P.

5. Date of Notice and Demand (Form 1–21) List ——. Serial No.

Witness my hand and official seal at San Francisco this 18th day of February, 1928.

(Signed) JOHN P. McLAUGHLIN,
Collector of Internal Revenue, 1st Internal Revenue Collection District of California.

Tax	882.07
Pen.	441.04
	$1323.11

(See instructions on reverse side.) [64]

RETURN OF DEPUTY COLLECTOR.

* I hereby certify that, pursuant to the herein warrant of distraint I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all the provisions of law were strictly complied with; that the property was sold at public auction, after due notice, to the highest biddes at the prices herein stated:

1. Date of receipt of warrant ————————
2. Date of notice of sale ————————
3. Description of property levied upon ————————
4. Notice of sale:————————
   By publication in newspaper at ————————
   By posting notice at following places: ————————
5. Name of Purchaser ————————
6. Amount received from sale ————————$————
7. Cost of Levy and sale ————————$————
8. Net Proceeds ————————$————

* Strike out lines inapplicable.

The gross proceeds, amounting to $———, are herewith inclosed.

* I have not executed the within warrant for the following reasons:

Dated at ———, 192—

———————————,

Deputy Collector.

INSTRUCTIONS.

For all warrants of distraint on which *it necessary* to make seizures and sales the collector will make a docket entry on Record 44, which entry should be substantially a transcript of the schedule on the inside of the warrant. Each warrant should be numbered and the number and name of the deputy to whom issued entered on Form 824. This will enable the collector to readily trace every warrant issued and insure its prompt return. Upon the return of the warrant by the deputy the entires on Form 824 should be completed, so that it will [65] give a complete history of all proceedings on said warrant, and in case of the sale of real estate, proper entires should also be made in Record 21. Upon the execution of the warrant it should be properly returned to the collector, with a report showing, in full what action was taken in each case. A report on Form 210 should be made to the Commissioner of Internal Revenue in all cases where personal property is sold under a warrant for distraint.

Sixty days are deemed ample time for the execution and return of a warrant for distraint by a

deputy collector. When report is delayed beyond that time the delinquent deputy should be called on for an explanation of the cause of such delay, and if not satisfactory the collector will require the deputy to execute and return the warrant at once.

When a warrant for distraint is returned with the report of no property found liable to distr*ia*nt, the deputy so reporting must accompany the return warrant with his affidavit on Form 53.

Attention of distraining officers is called to the following provisions of law: "Provided, That there shall be exempt from distraint and sale, if belonging to the head of a family, the schoolbooks and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding thirty days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools or implements, of a trade or profession, to an amount not greater than one hundred dollars, shall also be exempt; and the officer making the distraint shall summon three disinterested householders of the vicinity, who shall appraise and set apart to the owner the amount of property herein declared to be exempt." [66]

DEFENDANT'S EXHIBIT No. 1.

COPY.

No. 22995.

WARRANT FOR DISTRAINT.

UNITED STATES OF AMERICA,

1st Collection District, State of California.

To ————————————,

Deputy Collector.

WHEREAS, in pursuance of the provisions of the acts of Congress relating to internal revenue the below named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same became due; AND WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same, YOU ARE HEREBY COMMANDED to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to property including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes as may be necessary to satisfy the tax or taxes, with 5 per centum additional upon the amount of the tax or taxes, and interest at the rate of 1 per centum per month from the time the tax or taxes became due,

and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods chattels, or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists for the tax or taxes, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. [67]

1. Name—Carl O. Hader,
2. Location 21 Hillway Ave., San Francisco, Calif.
3. Description of Tax:

Add'l 1922 Income.
1040 0A Dummy.
Sec. 274 D Tele Asst.
Income Sales Pro-Narc Misc.

Amount of tax..... 947.71
Amount of penalty and interest. Int. 33 mos. at ½%....156.37

Total tax, penalty, and interest.....1104.08

Amount of additional interest due from date of issue 2/15/28.

4. Date of Notice and Demand (Form 1–17) 5/15/25. List May, 1925. Serial No. Spl. #9–02P.

5. Date of Notice and Demand (Form 1–21) List ——. Serial No.

Witness my hand and official seal at San Francisco this 18th day of February, 1928.

Tax $631.81
Pen. $315.90

$947.71

(Signed) JOHN P. McLAUGHLIN,
Collector of Internal Revenue, 1st Internal Revenue Collection, District of California.

(See instructions on reverse side.) [68]

RETURN OF DEPUTY COLLECTOR.

* I hereby certify that, pursuant to the herein warrant of distraint I proceeded to levy upon and sell the property herein described in order to satisfy the taxes, penalties, and interest herein stated and required by law, and that all the provisions of law were strictly complied with; that the property was sold at public auction, after due notice, to the highest bidder at the prices herein stated:

1. Date of receipt of warrant ——————
2. Date of notice of sale ——————
3. Description of property levied upon ——————
4. Notice of sale:
   By publication in newspaper at ——————
   By posting notice at following places:——
5. Name of Purchaser ——————
6. Amount received from sale ——————$——
7. Cost of levy and sale ——————$——
8. Net Proceeds ——————$——

The gross proceeds, amounting to $———, are herewith inclosed.

* I have not executed the within warrant for the following reasons:

Dated at ———, 192—,

———————————,

Deputy Collector.

* Strike out lines inapplicable.

INSTRUCTIONS.

For all warrants of distraint on which *it necessary* to make seizures and sales the collector will make a docket entry on Record 44, which entry should be substantially a transcript of the schedule on the inside of the warrant. Each warrant should be numbered and the number and name of the deputy to whom issued entered on Form 824. This will enable the collector to readily trace every warrant issued and insure its prompt return. Upon the return of the warrant by the deputy the entries on Form 824 should be completed, so that it will [69] give a complete history of all proceedings on said warrant, and in case of the sale of real estate, proper entries should also be made in Record 21. Upon the execution of the warrant it should be promptly returned to the collector, with a report showing, in full, what action was taken in each case. A report on Form 210 should be made to the Commissioner of Internal Revenue in all cases where personal property is sold under a warrant for distraint.

Sixty days are deemed ample time for the execu-

tion and return of a warrant for distraint by a deputy collector. When report is delayed beyond that time the delinquent deputy should be called on for an explanation of the cause of such delay, and if not satisfactory the collector will require the deputy to execute and return the warrant at once.

When a warrant for distraint is returned with the report of no property found liable to distraint, the deputy so reporting must accompany the return warrant with his affidavit on Form 53.

Attention of distraining officers is called to the following provisions of law: "Provided, That there shall be exempt from distraint and sale, if belonging to the head of a family, the schoolbooks and wearing apparel necessary for such family; also arms for personal use, one cow, two hogs, five sheep and the wool thereof, provided the aggregate market value of said sheep shall not exceed fifty dollars; the necessary food for such cow, hogs, and sheep, for a period not exceeding thirty days; fuel to an amount not greater in value than twenty-five dollars; provisions to an amount not greater than fifty dollars; household furniture kept for use to an amount not greater than three hundred dollars; and the books, tools or implements, of a trade or profession, to an amount not greater than one hundred dollars, shall also be exempt; and the officer making the distraint shall summon three disinterested householders of the vicinity, who shall appraise and set apart to the owner the amount of property herein declared to be exempt." [70]

DEFENDANT'S EXHIBIT No. 3.

State of California,
City and County of San Francisco,—ss.

William L. Hughson, being first duly sworn, says that he is a resident of the City and County of San Francisco, State of California; that in August, 1925, affiant signed bonds as surety for Carl A. Hader, which bonds were signed for the express purpose of staying the collection of certain defiicency taxes claimed to be due upon the income of Carl A. Hader for the years 1920 to 1924 inclusive, pending an appeal.

Said appeal of Carl A. Hader from the assessment of said deficiency taxes for the years 1920 to 1924 inclusive, was not perfected and in fact was dismissed on motion made by the Commissioner of Internal Revenue, and a hearing upon the merits thereof was never had.

After affiant signed said bonds, and in the early part of 1926, affiant discovered that said Carl A. Hader, who had previously been employed as the private secretary to affiant, had for many years prior to 1926 been embezzling money from the William L. Hughson Company, a Corporation, of which affiant was, and is, the president and owner of fifty (50) per cent of the stock thereof, and from Hughson & Merton Incorporated, a Corporation, of which corporation affiant owns one hundred (100) per cent of the stock during all of the said times.

Affiant has not been able to trace the peculations and embezzlements of Hader prior to the year 1922, but for five years, from 1922 to 1926, said Hader

embezzled from the William L. Hughson Company over thirty-one thousand (31,000) dollars, and from Hughson & Merton over eighteen thousand (18,000) dollars.

Considering the methods used by said Hader in effecting said embezzlements, affiant feels quite positive in asserting that similar acts of embezzlement were committed by Hader during 1920 and 1921, and by reason of the embezzlements, hereinabove specifically referred to, this affiant has sustained the loss of over fifteen thousand (15,000) dollars by reason of said embezzlement from the William L. Hughson Company, and a loss of approximately eighteen thousand (18,000) dollars by reason of said embezzlements, of Hader, from Hughson & Merton.

The losses occasioned by said acts of embezzlement, above referred to, have not been made good either to Hughson & Merton, or to said William L. Hughson Company by said Carl A. Hader, or by any person for him, or on his behalf.

Affiant is informed and believes, and upon such information and belief alleges that the Bureau of Internal Revenue in fixing the deviciency in tax due upon the alleged income of said Hader for the years 1920 to 1924 inclusive based it largely upon the deposits made by said Hader in the bank account in which he deposited his money, which account was kept in the [71] name of his wife, E. A. Hader. It is practically impossible at this late date, after so many years have elapsed, to analyze all of the deposits made by Hader in said account kept in

the name of E. A. Hader, and neither said Carl A. Hader or E. A. Hader have any memoranda or data which would show these details, nor have they retained, nor is there in existence any of the checks drawn against said account.

One item in the Revenue Agent's Report of the income of said Hader for the year 1920 charges Hader with having received as income, a certain item or eight thousand (8,000) dollars. This one item I have been able to trace, and I can say, positively, that it was not properly treated as income of said Carl A. Hader, either in 1920, or at any other time. This sum of eight thousand (8,000) dollars was represented by a check given to Mr. Hader by Mr. Worth Hall, a resident of Detroit, and having his office at this time, at the General Motors Building, Detroit. Out of this eight thousand (8,000) dollar check, which Mr. Hall gave to Mr. Hader, five thousand (5,000) dollars of it was used to purchase stock in a certain corporation, and three thousand (3,000) dollars of it was returned by Hader to Mr. Hall, all of which will appear from a letter written by Mr. Hall to my attorney, Mr. Harry F. Sullivan, which letter is attached hereto.

In view of the entire situation, as hereinabove outlined, and without admitting, in any way, legal liability upon the bonds in question, I hereby offer to pay the sum of one hundred (100) dollars in compromise of my claim which the government feels it has against me by reason of my signing said bonds.

(Signed) WILLIAM L. HUGHSON.

Subscribed and sworn to before me this 15th day of January, 1930.

NEVA A. KEMPER,
Notary Public, in and for the City and County of San Francisco, State of California. [72]

DEFENDANT'S EXHIBIT No. 4.

TREASURY DEPARTMENT,
BUREAU OF INTERNAL REVENUE,
WASHINGTON.

January 8, 1930.

Office of
The General Counsel
Address Reply to the General Counsel Bureau of Internal Revenue and Refer to
GC:C:ETK.
236823.

Harry F. Sullivan, Esq.,
Humboldt Bank Building,
San Francisco, California.

In re: Carl O. Hader, San Francisco, California.

Sir: Reference is made to your letter of July 30, 1929, in which you advised that you were obtaining certain information which you believed would justify the acceptance of an offer in compromise in settlement of the bond liability of the above named taxpayer concerning outstanding income taxes for the years 1920 to 1923, inclusive.

Please be advised that this office has heard nothing further from you nor has an offer in compromise

been received. Unless some definite action is taken by you within the next few days in the matter of settling the liability involved it will be necessary for this office to institute suit on the bond in said case because the Government does not desire to let the case remain in its present unsatisfactory status any longer.

Kindly advise as to your intention with respect to settlement at your early convenience.

Respectfully,
C. M. CHARESH (?)
General Counsel.

em

January 15th, 1930.

GC:C:ETK.
236823.
General Counsel,
Bureau of Internal Revenue,
Washington, D. C.

In Re Carl A. Hader.

Sir: Replying to your letter of January 8th, 1930, regarding the liability of William L. Hughson on bonds of Carl A. Hader. [73] While in Washington in June of last year I spoke with Mr. F. E. Kemper, regarding this matter, discussed with him the question of legal liability of Hughson, and also discussed with him the facts, and told him that later I would attempt to prepare and send him an offer of compromise for Mr. Hughson in this matter. Various conditions have prevented me from doing this earlier.

However, I am sending you, herewith, an offer from Mr. Hughson, together with check for one

hundred (100) dollars, and in support thereof I will say that I feel when you have reviewed the facts set forth in his offer of compromise, you will conclude that he should not be called upon, to pay any money by reason of any deficiency taxes alleged to be due on the income of Carl A. Hader.

Respectfully yours,

HARRY F. SULLIVAN.

HFS:MJ. [74]

The foregoing constitutes a condensed statement of the testimony of the witnesses for the respective parties, given upon the trial of the above entitled cause, and also all of the exhibits offered and introduced in evidence, by the respective parties hereto, and admitted in evidence by the Court, at the trial of said cause.

Dated: September 24th, 1931.

HARRY F. SULLIVAN,

Attorney for Defendant William L. Hughson,

I, Harold Louderback, Judge of the above-entitled court, hereby certify that the foregoing bill of exceptions contains the substance of all the testimony, and also all of the exhibits admitted in evidence at the trial of this cause, and further proceedings had, and each exception stated to have been taken by counsel for defendant William L. Hughson, was so duly taken by him and duly allowed and noted by Court; and in order that each and every one thereof may be preserved and made of record, this bill of exceptions is duly settled, approved and signed, and ordered to be made of record in this cause.

Dated: October 13th, 1931.

HAROLD LOUDERBACK,
United States District Judge.

Receipt of a copy of the within proposed bill of exceptions is admitted this 26 day of September, A. D. 1931.

GEO. J. HATFIELD,
ESTHER B. PHILLIPS,
Attorney for Plaintiff United States of America.

[Endorsed]: Filed Oct. 13, 1931. [75]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Hon. HAROLD LOUDERBACK, District Judge of the United States District Court, Southern Division, Northern District of California:

William L. Hughson, one of the defendants in the above-entitled action, feeling aggrieved by the judgment given, made, and entered therein on the 21st day of August, A. D. 1931, in favor of plaintiff, and against this defendant, hereby appeals from said judgment to the Circuit Court of Appeals of United States for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and respectfully prays that his appeal be allowed, and that citation be issued as provided by law, and that a copy of the record, opinion of the Court, bill of exceptions, assignment of errors, and all proceedings in the case, duly authenticated, be sent to the United

States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court, in such case made and provided. [76]

And this petitioner further prays that the proper order be made herein, relating to the security required of this defendant and appellant pending said appeal.

Dated August 31st, 1931.

WILLIAM L. HUGHSON,
Petitioner, Defendant and Appellant.

HARRY F. SULLIVAN,
Attorney for Petitioner, Defendant and Appellant.

[Endorsed]: Filed Sep. 15, 1931. [77]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes William L. Hughson, one of the defendants in the above-entitled cause of action, and files the following assignment of errors upon which he will rely in the prosecution of his appeal herein from the judgment made by this Court on the 21st day of August, 1931.

I.

That the United States District Court for the Northern District of California, Southern Division, erred in Finding "II" wherein said court finds that "on or about August 18th, 1925, said bonds were delivered to John P. McLaughlin, United States Collector of Internal Revenue at San Francisco,

and were duly accepted by said Collector and his Superiors," for the reason that there is no allegation in either of the four counts of plaintiff's complaints that all or any of said four bonds were duly accepted by said Collector or his superiors.

II.

Said District Court erred in Finding "I" wherein it finds that the allegations of Paragraph "VI" of plaintiff's first, second, third and fourth causes of action are true, for [78] the reason that in Paragraph "VI" of each of said four causes of action, set forth in plaintiff's complaint, it is alleged that "said defendant filed an appeal with the United States Board of Tax Appeals," but in neither of said four causes of action is it alleged that any order, assessment, or determination had been made or was in existence at the time of the filing of the alleged appeal from which defendant Hader had any right to file an appeal; nor was there in existence at that time any order, assessment, or determination from which said defendant could take or file an appeal.

III.

Said District Court erred in Finding "II" in finding that the four bonds in suit, which are attached as Exhibits "A," "B," "C" and "D," to plaintiff's complaint, were executed and given for a consideration, for the reason that each of said four bonds was executed in order to stay the collection of taxes from defendant Hader upon the express theory and statement that he had perfected an appeal whereas said appeal was prematurely and

improperly filed, and no appeal was ever perfected by said Hader, as there was no order or assessment then in existence with which such an appeal could have been taken and perfected by him.

IV.

Said District Court erred in failing to find that defendant Hughson received no consideration for the execution of the four bonds, Exhibits "A," "B," "C" and "D," attached to plaintiff's complaint, in that said bonds were each and all executed and predicated upon the belief that Hader had filed and perfected an appeal, whereas, in truth, and in fact, no appeal was ever perfected by Hader, and there was no order, determination, or assessment in existence at the time of the [79] filing of said alleged appeal from which said Hader could take, file, or perfect an appeal.

V.

Said District Court erred in giving and making its judgment herein in favor of plaintiff, and against the defendant Hughson, for the reason that there is no allegation in plaintiff's complaint, nor in either of the four causes of action therein set forth, nor is there any findings made by the Court to the effect that defendant Hader did not, after July 14th, 1928, and prior to the filing of the complaint herein, on January 7th, 1931, pay the taxes assessed against him.

VI.

Said District Court erred in failing to find, and in not finding, as alleged in defendant's answer, that the Commissioner of Internal Revenue accepted one

hundred (100) dollars from defendant Hughson on or about the 7th day of February, 1930, in compromise of whatever claims, plaintiff, or the Commissioner of Internal Revenue, had against defendant Hughson, based on, or arising out of, said four bonds, Exhibits "A," "B," "C" and "D," hereinabove referred to.

VII.

Said District Court erred in failing to find, and in not finding, that the cashing of the check of defendant William L. Hughson for one hundred (100) dollars, on February 7th, 1930, constituted an acceptance of the offer of compromise made by said defendant Hughson, which offer of compromise was sent by defendant Hughson, on or about the 15th of January, 1930, together with said check, to the Commissioner of Internal Revenue.

VIII.

Said District Court erred in failing to find, and in not finding, that the cashing, on February 7th, 1930, of the check of William L. Hughson for one hundred (100) dollars, [80] without at the time, advising said Hughson that said one hundred (100) dollars was not being accepted in compromise of any claims the Commissioner of Internal Revenue, or the plaintiff herein had against him, constituted in law, an acceptance of the offer of compromise of said claims.

IX.

Said District Court erred in failing to find, and in not finding, that each of the four causes of action set forth in plaintiff's complaint herein, was, and

is, barred by the provisions of Section 791, Article 28, of the United States Code.

X.

Said District Court erred in failing to find, and in not finding, that defendant Hader did not perfect an appeal to the Board of Tax Appeals, as provided in each of said four bonds, as the consideration therefor.

XI.

Said District Court erred in failing to find, and in not finding, that said defendant Hader did not take an appeal from any order or determination of the Commissioner of Internal Revenue, in regard to any income taxes assessed against said Hader for the years 1920, 1921, 1922 and 1923.

XII.

Said District Court erred in concluding, as a matter of law, that plaintiff is entitled to recover interest herein, after July 15th, 1928, at the rate of twelve (12) per cent per annum.

XIII.

Said District Court erred in permitting witness John P. McLaughlin, Collector of Internal Revenue, over objection of defendant, to answer the following question—"Q. Mr. McLaughlin, I now show you a certified copy of an assessment [81] certificate against Mr. Carl A. Hader, for various amounts covering several years. I would like to have you look at that and tell me when that assessment cer-

tificate came to your office, if you know. You can refresh your recollection with it."

XIV.

Said District Court erred in permitting witness John P. McLaughlin, over objection of this defendant, to answer the question "Why not?" after said witness had testified that between August, 1925, and March, 1928, he did not take any steps to collect*ion* any taxes from Mr. Hader.

XV.

Said District Court erred in failing to grant this defendant's motion to strike out the words "which cover the claims" as appears in the following answer to the following question—"Q. Did you have any reason for not attempting to make collection upon this assessment? A. The fact that I had bonds which covered the claims, and that the claims were pending, and until the claims were rejected there should be no action. After that we could proceed at any time. We had to."

XVI.

Said District Court erred in admitting in evidence over the objection of this defendant, Plaintiff's Exhibit No. 1, which is a certified copy of assessment-roll, showing taxes assessed against Carl A. Hader.

XVII.

Said District Court erred in admitting in evidence, over defendant's objection, Plaintiff's Exhibit No. 2, which is an offer of compromise on Form 656,

which was signed by defendant Hughson, after he had sent his check, for one hundred (100) dollars, and the offer of compromise, dated January 15th, 1930, to the Commissioner of Internal Revenue. [82]

WHEREFORE, defendant William L. Hughson, prays that said judgment of said District Court, be reversed in whole, and as to each of its parts, and that judgment be given and made herein, in favor of defendant William L. Hughson, and against the plaintiff, and that said William L. Hughson have, and recover his costs.

Dated August 31st, 1931.

WILLIAM L. HUGHSON,
Defendant.

HARRY F. SULLIVAN,
Attorney for Defendant, William L. Hughson.

[Endorsed]: Filed Sep. 15, 1931. [83]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On Motion of Harry F. Sullivan, Esq., attorney and counselor for William L. Hughson, one of the defendants in the above-entitled cause, IT IS HEREBY ORDERED that an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the judgment given and made herein on August 21st, 1931, be and the same is hereby allowed; and that a copy of the record, opinion

of the Court, assignment of errors, bill of exceptions, and all proceedings in the cause, duly authenticated, be forthwith transmitted to said Circuit of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal herein, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal, be and the same is hereby fixed at the sum of $11,800.00.

Dated: September 14, 1931.

HAROLD LOUDERBACK,
United States District Judge.

Approved as to the amount.

GEO. J. HATFIELD,
U. S. Attorney,
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 15, 1931. [84]

[Title of Court and Cause.]

SUPERSEDEAS ORDER.

William L. Hughson, one of the defendants herein, having, this day, been allowed an appeal herein from the judgment of this Court, in favor of plaintiff and against defendant,

IT IS ORDERED that said appeal shall operate as a supersedeas, said defendant and appellant, William L. Hughson, having executed a supersedeas

and cost bond in the sum of eleven thousand eight hundred (11,800) dollars, as provided by law, and the Clerk is hereby directed to stay the mandate of this District Court, until the further order of this Court.

Dated Sep. 14, 1931.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Sep. 15, 1931. [85]

[Title of Court and Cause.]

SUPERSEDEAS AND COSTS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned, William L. Hughson as principal, and American Bonding Company of Baltimore as surety, are held and firmly bound to the United States of America, in the full sum of eleven thousand eight hundred (11,800) Dollars, in lawful money of the United States, as a supersedeas and costs bond, on the appeal taken from this court to the Circuit Court of Appeals, Ninth Circuit, by William L. Hughson, one of the defendants in the above-entitled cause, from the judgment given and rendered herein against him and in favor of plaintiff, on August 21st, 1931; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals this 10th day of September, A. D. 1931.

NOW, THEREFORE, The condition of the above obligation is such, that if the above bounden principal shall prosecute his said appeal to said Circuit Court of Appeals for the Ninth Circuit, to effect, and answer all damages, costs and interest, if he fail to make said appeal good, and if said judgment of said District Court be affirmed by said Circuit Court of Appeals, and shall be complied with in all respects by said principal, William L. Hughson, [86] or if said judgment be affirmed in part or modified, and shall be complied with by said principal, in all respects as so affirmed in part or as so modified, then this obligation to be void and of no effect; otherwise to remain in full force and effect.

IT IS EXPRESSLY AGREED, by the undersigned surety, that in case of the breach of the conditions hereof, the Court may, upon ten (10) days notice to said surety, proceed summarily in this cause to ascertain the amount which said surety is bound to pay on account of such breach, and may then immediately give and render judgment therefor against said surety and award execution therefor.

IN WITNESS WHEREOF, said principal has hereunto subscribed his name, and said surety, by its officers thereunto duly authorized, has hereunto subscribed its corporation name and affixed its

corporate seal this —— day of September, A. D. 1931.

[Seal] WILLIAM L. HUGHSON,
Principal.

AMERICAN BONDING COMPANY OF BALTIMORE,
By WALTER JARDINE,
Attorney-in-fact,
Surety.

The within and foregoing undertaking is approved September 14th, 1931.

HAROLD LOUDERBACK,
United States District Judge. [87]

State of California,
City and County of San Francisco,—ss.

On this 10th day of September, 1931, before me, S. Walter Burke, a notary public, in and for the county and state aforesaid, duly commissioned and sworn, personally appeared Walter Jardine known to me to be the person whose name is subscribed to the foregoing instrument as the attorney-in-fact of the American Bonding Company of Baltimore, and acknowledged to me that he subscribed the name of American Bonding Company of Baltimore thereto as principal and his own name as attorney-in-fact.

[Seal] S. WALTER BURKE,
Notary Public in and for the State of California,
County of San Francisco.

My commission expires July 30, 1935.

State of California,
City and County of San Francisco,—ss.

On this 15th day of Sept. in the year one thousand nine hundred and thirty-one before me, Neva A. Kemper, a notary public in and for the city and county of San Francisco, personally appeared William L. Hughson, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, the day and year in this certificate first above written.

[Seal] NEVA A. KEMPER,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 20th, 1931.

[Endorsed]: Filed Sep. 15, 1931. [88]

[Title of Court and Cause.]

ADMISSION OF SERVICE.

Admission of service, and receipt of copies of the following papers in the above-entitled matter, are hereby admitted this 14th day of September, 1931:

1. Petition for appeal.
2. Order allowing appeal.
3. Supersedeas order.
4. Assignment of errors.
5. Exceptions to findings.

Dated: Sept. 14, 1931.

GEO. J. HATFIELD,
United States Attorney.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Sep. 15, 1931. [89]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue certified record to be used on appeal by the defendant William L. Hughson, from the judgment heretofore given, made and entered in and by the above-entitled court on the 21st day of August, 1931, in favor of plaintiff and against the defendant William L. Hughson, and have the same in the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, on or before the 15th day of November, 1931.

In preparing said record on appeal it is respectfully requested that it be made up of the following papers:

1. Complaint of plaintiff.
2. Answer of defendant William L. Hughson.
3. Stipulation waiving jury trial.
4. Bill of exceptions.
5. Findings of fact and conclusions of law.
6. Judgment.
7. Notice of entry of judgment.

8. Exceptions to findings.
9. Supersedeas order.
10. Petition for appeal.
11. Order allowing appeal.
12. Assignment of errors.
13. Supersedeas and costs bond.
14. Citation.
15. Admission of service of petition for appeal, order allowing appeal, supersedeas order, assignment of errors and exceptions to findings.
16. Praecipe for record on appeal.
17. Clerk's return and certificate to record.

We respectfully request that the same be certified by you as required by law and the rules of the court, and that you further state in your certificate under seal, the cost of the record and by whom paid.

HARRY F. SULLIVAN,

Attorney for Defendant, William L. Hughson, 718 Humboldt Bank Building, San Francisco, California.

Received a copy of the within praecipe this 14th day of October, 1931.

GEO. J. HATFIELD,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 14, 1931. [90]

(Title of Court and Cause.)

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing 90 pages, numbered from 1 to 90, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $14.30; that the said amount was paid by the defendant and appellant, and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 26 day of October, A. D. 1931.

[Seal] WALTER B. MALING,
Clerk, United States District Court for the Northern District of California. [91]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America to The United States of America, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein William L. Hughson is appellant and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, this 16th day of September, A. D. 1931.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed Sep. 16, 1931. [92]

[Endorsed]: No. 6644. United States Circuit Court of Appeals for the Ninth Circuit. William L. Hughson, Appellant vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 26, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

HARRY F. SULLIVAN,
Humboldt Bank Building, San Francisco,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

THE FACTS.

This action was instituted by the United States of America to recover a money judgment from appellant Hughson as surety, and defendant Hader as principal, upon four certain bonds, executed by them in connection with the attempted staying of the collection of certain deficiency taxes assessed against the defendant Hader for the years 1920, 1921, 1922 and 1923. This is not an action for the collection of income taxes, but is an ordinary action upon contract. The action went to trial as against only one defendant, namely, William L. Hughson, the appellant herein. The other party defendant, Hader, was not before the Court.

There are four causes of action stated in the complaint on file herein, each being upon a separate bond.

In May, 1925, as is alleged in Paragraph V of each of the four causes of action in said complaint, the Commissioner of Internal Revenue assessed deficiency taxes and penalties against Hader for each of the four years above referred to. Hader, in attempting to take and perfect an appeal from each of said four determinations of the Commissioner, filed a purported appeal with the United States Board of Tax Appeals.

It is alleged in the complaint, that on May 15th, 1925, the Collector demanded of Hader payment of the deficiency taxes, and that on May 18th, 1925, the Deputy Commissioner, in writing, notified Hader of the assessment thereof.

It is then alleged that on June 8th, 1925, Hader filed four claims in abatement, seeking abatement of the deficiency tax for each of the four years mentioned.

On November 17th, 1925 (3 B. T. A. 1367), the purported, or attempted appeal so filed by Hader was dismissed by the Board of Tax Appeals upon the ground that it had been prematurely taken.

On December 9th, 1927, as alleged in Paragraph VIII of the first, second and fourth causes of action, and in Paragraph VII of the third cause of action in said complaint, the Commissioner of Internal Revenue rejected each of said claims in abatement.

Thereafter, and on the 7th day of January, 1931, this action was commenced.

WILLIAM L. HUGHSON'S DEFENSE.

Appellant Hughson, in his answer (Transcript pp. 37-48), to plaintiff's complaint herein, sets up the following defenses to each of the four causes of action appearing in the complaint on file herein,

1st. Denial of his liability upon each of the four bonds above referred to, because of lack of consideration.

2nd. Each of said causes of action was barred under the provision of Section 791, Title 28, United States Code.

3rd. Said bonds were not filed within the time required by law, and were never accepted or approved by the Collector of Internal Revenue, as required by law.

4th. The claims in abatement were not filed within the time required by law.

5th. Appellant Hughson, on January 15th, 1930, made to the Commissioner of Internal Revenue, an offer of compromise, of his alleged liability upon the four bonds involved herein, and the Commissioner of Internal Revenue, upon the 7th day of February, 1930, accepted $100.00 from said Hughson in full payment of all claims against said Hughson upon said four bonds.

THE JUDGMENT.

On August 19th, 1931, after the submission of said cause for decision, the United States District Court gave and made its judgment in favor of the United

States, and against William L. Hughson, upon each of the four causes of action, set forth in said complaint, and directed (Transcript pp. 55-56) that the United States recover from said Hughson:

a. On the first cause of action, the sum of $1,-814.03 with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

b. On the second cause of action, the sum of $1,-323.11, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

c. On the third cause of action, the sum of $947.41, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

d. On the fourth cause of action, the sum of $670.80, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum, together with costs of suit.

APPELLANT'S POINTS.

Appellant Hughson, in taking an appeal to this Honorable Court, respectfully requests that the judgment given and made by said trial Court in favor of the United States of America, and against this appellant, be reversed, and a judgment be entered in favor of appellant Hughson, for costs upon the following grounds:

1. *There was no consideration for the bonds.*

2. *Statute of Limitations bars this action.*

3. *Bonds were never accepted and approved.*

4. *Bonds and abatement claims filed too late.*

5. *There was an accord and satisfaction which released Hughson.*

6. *No allegation or finding that Hader perfected appeal.*

7. *Interest at 12% per annum is improper.*

8. *Evidence* (Transcript p. 58) *in Assignment of Errors XIII* (Transcript p. 103) *improperly admitted.*

9. *Evidence* (Transcript p. 60) *referred to in Assignment of Errors XIV* (Transcript p. 104) *improperly admitted.*

10. *Evidence* (Transcript p. 61) *referred to in Assignment of Errors XV* (Transcript p. 104) *improperly admitted.*

11. *Plaintiff's Exhibit No. 1* (Transcript pp. 67-70) referred to in Assignment of Errors XVI (Transcript p. 104) *improperly admitted.*

12. *Plaintiff's Exhibit No. 2* (Transcript pp. 71-76) referred to in assignment of Errors XVII (Transcript p. 104) *improperly admitted.*

ARGUMENT.

1. NO CONSIDERATION FOR BONDS.

To save the time of this Court in reading through the entire bond, we take the liberty of quoting that certain portion thereof, which we claim, in the light of the admitted and proven facts, established beyond a doubt, that there was no consideration for the execution of these four bonds, to-wit:

> "Whereas, the principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year....., and desires that the payment of the deficiency tax be extended until the determination of said appeal, as a matter of fairness and justice." (Transcript pp. 24-25.)

There was no consideration for the execution by Hughson of either of the four bonds in suit, as they were executed under the erroneous assumption that appeals had been taken and perfected, which assumption was not a fact. (Assignment of Errors II, III, and IV, Transcript pp. 100-101.)

These four bonds were executed by appellant Hughson, as surety, for the express purpose, therein stated, of staying the collection of the taxes assessed against Hader, until the disposal of the appeals, which, it was assumed as recited in the bonds, had been perfected by Hader.

That notice of appeal to the Board of Tax Appeals was filed by Hader, is admitted. On November 17th, 1925, this purported appeal was dismissed by the Board of Tax Appeals (3 B. T. A. 1367), on the ground that the appeal had been prematurely taken,

in that it was not based upon a final determination by the Commissioner.

In re Jackson K. Dering, 3 B. T. A. 1312;
In re Clois L. Greene, 2 B. T. A. 148.

The effect of this order, so made by the Board of Tax Appeals, was a finding that at the time Hader sought to take this appeal, there was in existence no order or determination from which he had a right to take an appeal, and the appeal so attempted to be taken by him was abortive. In other words, so far as the record was concerned, Hader had taken no appeal. This being so, the recital in the bonds, that Hader had perfected an appeal, is and was untrue, and as that was the express condition upon which the execution of the bonds was predicated, it resulted in destroying the entire consideration for the execution of these four bonds.

In support of the foregoing contention, we respectfully direct the Court's attention to the case of *Clarke v. Mohr,* 125 Cal. 540.

In this case, certain undertakings or bonds on appeal, were signed and executed by the parties and sureties on October 9th, 1898. Each of these bonds recited the rendition of a judgment, the dissatisfaction of appellant therewith, a denial of a motion for new trial, and the desire of the parties to appeal therefrom; and that in consideration of the premises the sureties undertook and promised, etc. In truth, the motion for new trial was not denied until December 2nd, 1898, indicating that motion for new trial had not been passed upon at the time the bonds were signed. The Supreme Court dismissed the appeals

from the order denying the motion for new trial, with the following comment:

> "At the time the instruments were signed the motion for a new trial had not been presented to the Court for its consideration, and the order denying it, was not made until December 2, 1898. There was therefore, no right to appeal therefrom on behalf of either of the appellants at the time they were signed and verified, and consequently no consideration for the execution of an undertaking upon such appeal." (p. 542.)

In further support of our contention, and in approval of the case of *Clarke v. Mohr,* supra, we cite the following cases:

Stackpole v. Hermann, 126 Cal. 465, 466;
Jarman v. Rea, 129 Cal. 157, 159.

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2. STATUTE OF LIMITATIONS BARS THIS ACTION.

The bonds in suit were executed and filed August 25th, 1925. (Transcript p. 60.) The complaint in this cause was filed January 7th, 1931. (Transcript p. 36.) More than five years elapsed between the time of the signing of the bonds and the commencement of this action.

Section 791, Article 28, of the United States Code provides that

> "no suit or prosecution for any penalty or forfeiture, pecuniary, or otherwise, accruing under the law of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced

within five years from the time when the penalty of forfeiture accrued."

Conceding, for the sake of argument only, that the bonds in suit were valid, and were properly accepted and approved as required by law, and that the obligations thereof became binding upon the surety, we insist that the obligations of the surety accrued and became binding, if at all, on November 17th, 1925, on which date the Board of Tax Appeals dismissed Hader's premature appeal. The bonds were executed upon the 25th day of August, 1925, and recited that they were executed for the express purpose of staying collection of taxes pending the appeal. Therefore, cause of action on these bonds accrued November 17th, 1925.

We honestly believe, that, inasmuch as no appeal was ever perfected by Hader, the bond, if considered binding at all, became effective on the 25th day of August, 1925. We are admitting however, for the sake of argument under this point alone, that they became effective as a liability against Hughson on the 17th of November, 1925. This action was commenced January 7th, 1931, as appears by the date of the filing of plaintiff's complaint herein.

It is quite true that the defense of the Statute of Limitations cannot be raised against the United States in an action in which the Government is a party, providing that in such action, the Government is setting up and claiming sovereign rights. This however, is not an action against Hughson based upon any of the sovereign rights of the Government against

Hughson, but is an ordinary action at law based upon four separate distinct written contracts, to which the same statutes are applicable, as would apply in an action between individual citizens of the Government, or between the Government and a citizen.

Under such circumstances, the appellant herein insists that he is absolutely justified in setting up the defense of the Statute of Limitations, against the United States, the appellee in this cause.

U. S. v. Nashville, et al., 118 U. S. 120, 125;
U. S. v. Seaboard Air Line, 22 Fed. 2nd 113.

In support of our contention that the four causes of action set forth in plaintiff's complaint herein, are barred by Title 27, Section 791 of the United States Code, because plaintiff and appellee herein is seeking the recovery of a penalty, we direct the Court's attention to the case of

Farni v. Tesson, 66 U. S. 309, 17 L. ed. U. S. 67.

In the case last cited, the United States Supreme Court said, in so many words, that "an action of debt on a bond is a demand for a penalty."

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3. **BONDS WERE NOT ACCEPTED OR APPROVED.**

The four bonds in suit never became binding obligations upon appellant Hughson, because they were never accepted or approved by the Collector of Internal Revenue, as required by the law and the regulations.

The regulations (Reg. 65, Art. 1281), required that the bonds must be approved by the Collector. There

is no endorsement on either of the four bonds in suit, showing that they were ever approved, nor was any evidence offered upon the trial of this case indicating the approval of these bonds by the Collector, nor was there any evidence that notice of the approval of said bonds was ever given by the Collector to any person, nor was there any evidence that any extension of time for the payment of the Hader taxes, was ever granted for any specific definite time, because of the filing of these four bonds.

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4. BONDS AND ABATEMENT CLAIMS FILED TOO LATE.

Neither the claims in abatement, nor the bonds in suit were filed within the proper time, under the Revenue Act of 1924, which was the Revenue Act in force at the time of the filing of the abatement claims and the bonds which are the subject of controversy in this proceeding.

The Revenue Act of 1924, Sec. 274, Sub. "d," provides for the assessment, levy and collection of jeopardy assessments. The last portion of said Subdivision "d" of said section, reads as follows:

> "If the taxpayer does not file a claim in abatement as provided in Section 279, the deficiency so assessed (* * *) shall be paid upon notice and demand from the Collector."

Sec. 279, Sub. "a" of said Revenue Act of 1924, provides that

> "If a deficiency has been assessed under Subdivision (d) of Section 274, the taxpayer, within 10 days after notice and demand from the Collector,"

may file a claim in abatement, accompanied by a bond. Art. 1281 of Reg. 65 of the Treasury Department, which were the regulations in force at the time these claims in abatement and bonds were filed, provides,

> "The bond shall be executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, and shall be subject to the approval of the Collector."

Art. 1281, Reg. 65, also provides,

> "The claim and bond must be filed with the Collector within 10 days after notice and demand from the Collector for payment of the deficiency."

There was no evidence introduced at the trial of this action showing positively and definitely, upon what dates the Collector made a demand upon Hader for the payment of these deficiency taxes, or when the Commissioner notified Hader thereof; but Paragraph V of each of the causes of action in plaintiff's complaint (Transcript p. 4) alleges that the Collector made such demand for payment upon Hader on May 15th, 1925, and that on May 18th, 1925, the Deputy Commissioner of Internal Revenue notified Hader, in writing, that an "assessment had been made in accordance with the provisions of Section 279 (d) of the Revenue Act of 1924."

The claims in abatement were filed by Hader on June 8th, 1925 (Transcript p. 59), and the four bonds, which William L. Hughson signed as a surety, did not accompany the claims in abatement, but said

bonds were filed with the Collector on the 25th day of August, 1925. (Transcript p. 60.)

We respectfully insist that the Collector of Internal Revenue had authority, under the law and the Treasury Department regulations, only to receive these claims in abatement from Hader, within the 10 days after a demand for the payment of the tax had been made upon said Hader, and only on condition that accompanying said claims in abatement, were the bonds referred to in said Section 279 of the Revenue Act of 1924. Upon the expiration of said 10 day period, said Collector was without any authority to stay the collection of taxes assessed under the jeopardy assessment; and the filing, by Hader, of claims in abatement on June 8th, 1925, more than 10 days after demand for payment of tax, and the signing and filing of the bonds in suit, on the 25th day of August, 1925, were mere idle acts, and could not, and did not, operate to stay the collection of these deficiency taxes, inasmuch as these deficiency taxes became due and payable immediately on demand under Sec. 274, Sub. "d" of the 1924 Revenue Act, unless within the period of 10 days following the demand for payment, a claim in abatement and bond were filed in accordance with the provisions in Section 279a of said 1924 Revenue Act.

As neither the claims in abatement, nor the bonds filed by Hader, were on file within the 10 day period, the Collector had no authority, under the law, to accept either the claims in abatement, or the bonds; nor did he have any authority to stay the collection of these deficiency taxes.

In this connection, we desire to particularly direct the Court's attention to the first paragraph of the opinion of the Board of Tax Appeals in the case of

White Oak Gasoline Co. v. Commissioner, 6 B. T. A. 941, 942,

from which we quote the following:

> "The Commissioner contends that the filing of a bond with a claim in abatement is a *sine qua non* to jurisdiction in this Board on appeal from the Commissioner's action on such claim. It is his contention that a claim so filed is erroneously filed and in fact never properly or legally filed at all; and that if the Commissioner accepts a claim under such conditions and thereafter passes upon it and makes a determination thereon, his action is void and his determination is of no effect because there is no claim before him as a predicate for any action."

The foregoing language quoted from the said opinion, is the exact position which is taken by us in this case.

We have contended, and still contend that the Collector of Internal Revenue, and even the Commissioner, is without authority to give any consideration to a claim in abatement unless the claim be filed within 10 days after demand for the payment of a jeopardy assessment, and unless, furthermore, a proper bond accompanies the claim in abatement.

This contention of ours besides being sustained by the contention of the Commissioner in the *White Oak Gasoline* case (supra), is also sustained by the Board of Tax Appeals in

Caribou Oil M. Co. v. Commissioner, 6 B. T. A. 511, 515;
Alabama Hardware Co. v. Commissioner, 7 B. T. A. 1178, 1182.

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5. ACCORD AND SATISFACTION.

On January 15th, 1930, almost a year prior to the commencement of this action, appellant Hughson, through his attorney, sent to the Commissioner of Internal Revenue at Washington, D. C., a written offer, Defendant's Exhibit No. 3, wherein he offered to pay, and enclosed a check for, the sum of $100.00 in full settlement of any and all claims which the Commissioner or Government held against him by reason of the execution by him, as surety, of the four bonds in suit. This check (Defendant's Exhibit No. 2, Transcript pp. 62, 63), was received by the Commissioner of Internal Revenue, was endorsed by him, and was evidently forwarded by him to the Collector of Internal Revenue at San Francisco, and collected through the San Francisco Federal Reserve Bank on February 7th, 1930. In receiving and endorsing said check, without any qualification or limitation, that act of endorsement, by the Commissioner, and the cashing of that check, operated as an unqualified acceptance of the offer of compromise so made by Hughson, and Hughson was thereupon immediately released from all liability under the four bonds in suit.

Upon the trial, and after this offer of compromise, Defendant's Exhibit No. 3, was admitted in evidence

without objection, plaintiff offered, and there was admitted in evidence, over the objection of said Hughson, another purported offer in compromise, which, it is claimed by the plaintiff and respondent, was the real offer of compromise submitted by said Hughson.

At a subsequent point in this brief (Point 12) we will discuss the structure and effect of Plaintiff's Exhibit No. 2, which is the other offer in compromise just referred to.

At the time Hughson submitted this offer of compromise, Defendant's Exhibit No. 3 (Transcript pp. 92, 95), to-wit, January 15th, 1930, the United States, and the Commissioner of Internal Revenue, or the Collector of Internal Revenue still had the right, and the time, to take such proceedings as might be appropriate, seeking to collect the taxes due from Hader. The Statute of Limitations had not yet commenced to run against the prosecuting of such a proceeding, nor had the warrants of distraint ever been withdrawn or vacated.

This offer made by Hughson was made in response to a letter to Harry F. Sullivan, from the General Counsel, Bureau of Internal Revenue, dated January 8th, 1930, being a portion of Defendant's Exhibit No. 4 herein. (Transcript pp. 95, 96.) In response to that letter Mr. Sullivan forwarded the written offer of compromise, Defendant's Exhibit No. 3, together with Hughson's check for $100.00, payable to the Commissioner of Internal Revenue. There is no evidence in the record in this case—because none exists—indicating that Mr. Sullivan, who forwarded this offer to the General Counsel, Bureau of Internal

Revenue, was ever advised by any person of the receipt or rejection of that offer of compromise.

After that check was endorsed, at Washington, by the Commissioner, it was evidently sent to the Collector of Internal Revenue at San Francisco, California, being received by him on or prior to February 6th, 1930, and it appears to have been certified on February 6th, 1930. There is no writing or mark on that check indicating that it was endorsed or accepted by the Commissioner with any limitation or qualification.

Hughson's check for $100.00 was cashed, and the money actually received and accepted by both the Commissioner and the Collector of Internal Revenue, without qualification or limitation, and long before Hughson's offer of compromise was ever rejected, if it was rejected.

In support of our claim that there was a completely executed accord and satisfaction of the claim against Hughson on these four bonds, we desire to call the Court's attention to the following language, which we quote from

1 *R. C. L.,* 196 and 197.

> "and when a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule but one of two courses opened to the creditor, either to decline the offer and return the check, or to accept it with the condition attached. *The moment the creditor endorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition, and is estopped from denying such agreement.*"

In the case of

Road Improvement District v. Wilkerson, 5 Fed. 2nd, 416, 418.

"It is a general principle of law, that, where there is a dispute concerning a claim, and a check is given, or other remittance to the creditor, which recites that it is in full payment of the claim, and the same is accepted by the creditor, *or the creditor collects the check without objection,* the transaction constitutes an accord and satisfaction."

We also respectfully call the Court's attention to the language of the Supreme Court of the State of California in a very well considered opinion, in the case of

Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27.

"The great weight of authority in American Courts undoubtedly supports the rule that where the amount due is in dispute, and a check for an amount less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all, it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction. * * *

"It may be accepted as settled law that where a claim is in dispute and the debtor sends or gives the creditor a check for a less sum, which

> he declares to be in full payment of all demands the recognition thereof by the creditor constitutes an accord and satisfaction."

In further support of the theory announced in the above citations, we direct the Court's attention to the following cases:

U. S. B. & S. Co. v. Thissell, 199 U. S. 608, 50 L. ed. U. S. 331;

C. M. & St. P. R. R. v. Clark, 178 U. S. 353, 44 L. ed. U. S. 1099;

Garfield, etc. v. Zendel, 43 Fed. 2d. 537;

Schwartzenberg v. Mayerson, 2 Fed. 2d. 327.

There is no positive direct evidence in the record indicating that either Mr. Hughson's offer of compromise, Defendant's Exhibit No. 3, or the other offer in compromise, Plaintiff's Exhibit No. 2, was ever rejected by the Commissioner of Internal Revenue, or that Mr. Hughson, or his attorney, Mr. Sullivan, was ever advised of the rejection of the compromise offer. The only hint that any offer was rejected, is contained in the testimony of Mr. John P. McLaughlin, in which he says "when the offer was rejected I tendered by telephone the check to Mr. Hughson." (Transcript p. 65.)

The above quoted testimony given by the witness McLaughlin calls up another question, namely, was there ever a real tender of the sum of $100.00 to Hughson, after his compromise was rejected, if it ever was rejected. The only testimony upon this point was given by the witness McLaughlin in that portion thereof above quoted.

We respectfully insist that a telephonic offer to deliver a check for $100.00 is not a good and valid tender. It is not a tender upon which anything will be predicated by the law. The only legal tender we know of, is the present personal offering in gold coin or currency, the same being at the time, in the possession of the party making the tender. This principle is so well known and so well understood, that we almost hesitated to mention it, and will certainly not be so indiscreet as to cite any authorities.

Let us refer back for a moment to the testimony of Mr. McLaughlin referred to a few lines above, when we quoted him as saying "when the offer was rejected I tendered by telephone the check to Mr. Hughson." (Transcript p. 65.)

To which offer did the witness McLaughlin refer in that statement? Did he intend us to conclude from that statement that the offer of January 15th, 1930, Defendant's Exhibit No. 3, was rejected? Quite apparently not, because Mr. McLaughlin was banking everything upon the other offer, Plaintiff's Exhibit No. 2. If then Plaintiff's Exhibit No. 2 was the offer which Mr. McLaughlin referred to as having been rejected, there is no alternative but for us to conclude that this other offer of January 15th, 1930, Defendant's Exhibit No. 3, was not rejected.

There is no indication or mark of any kind on Plaintiff's Exhibit No. 2, from which anyone could draw the deduction that it was intended as a modification of Hughson's offer of January 15th, 1930 (Defendant's Exhibit No. 3), or that it was intended as a substitute for this latter offer.

These two offers are separate and distinct, neither one referring to the other, and each seeks apparently, to compromise a liability separate and distinct from the liability referred to in the other. Defendant's Exhibit No. 3 is an offer by Hughson to compromise his alleged and disputed liability under four certain bonds, while Plaintiff's Exhibit No. 2, to which Hughson's name is improperly signed, is apparently an offer to compromise a liability not against Hughson, but a tax liability against Hader for deficiency taxes.

Furthermore, regardless of which offer, it may have been, that Mr. McLaughlin believed was rejected, there is certainly no testimony in the record in this case showing that two offers were rejected, even if we concede for the sake of the argument, that there is any evidence in this record showing that any offer was rejected. It necessarily follows therefore, that if two offers were presented, and only one was rejected, then by process of elimination, the other was not rejected; and, inasmuch as Hughson sent $100.00 to the Commissioner with his offer of January 15th, 1930, Defendant's Exhibit No. 3, then we are forced to conclude that this $100.00 was received and accepted by the Commissioner under the offer with which it was sent to him, and which was never rejected.

6. NO ALLEGATION OR FINDING THAT HADER PERFECTED APPEAL.

In Paragraph VI of the first, second, and fourth causes of action (Transcript p. 4), and in Paragraph V of the third cause of action, set forth in plaintiff's complaint, there is an allegation that Hader filed an appeal with the Board of Tax Appeals, but there is not, in said complaint, any allegation that this appeal was perfected.

Nor is there any finding made by the trial Court, to the effect, that Hader had perfected an appeal.

For the purpose of enforcing liability against Hughson, the surety upon these four bonds, it was absolutely essential that it be alleged in the pleadings, and that the Court make a finding, if such were the fact, that Hader had perfected an appeal. This was the primary and all-important condition upon which the execution of these bonds by Hughson, was predicated. Without such a finding we respectfully, but earnestly, insist that the judgment rendered herein, in favor of the United States, cannot be supported.

Hughson's intent, in signing these bonds, was to permit Hader to defer the payment of taxes due from Hader until an appeal, already perfected, had been heard and passed on by the Board of Tax Appeals. If the appeal were not perfected before these bonds were signed, then the bonds never became operative.

Both the Commissioner of Internal Revenue, and the Collector of Internal Revenue, from experience, and by reason of the nature of their duties, knew this, and also knew that they were immediately entitled to proceed against Hader to collect his taxes,

by warrant of distraint, or otherwise. The fact that they failed to act did not, and could not, have the effect of vitalizing these four bonds, the obligations of which were never given birth.

White Oak Gasoline Co. v. Commissioner, 6 B. T. A. 941, 942;

Caribou Oil M. Co. v. Commissioner, 6 B. T. A. 511, 515;

Alabama Hardware Co. v. Commissioner, 7 B. T. A. 1178, 1182.

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7. INTEREST AT 12% PER ANNUM IS IMPROPER.

This is not an action against Hughson as a taxpayer, but it is one seeking to enforce his alleged liability as a surety on the four bonds in suit. The limits of Hughson's liability, if any, are embraced solely and strictly, within the language and terms of these four bonds.

The judgment in this case directed that the plaintiff, appellee herein, recover judgment against the defendant Hughson, appellant herein, for four certain amounts for each of the four years respectively, for which deficiency taxes were assessed against Hader, with interest at 6 % from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum. (Transcript p. 56.)

There is no allegation in plaintiff's complaint setting up any fact or reason for the raising of the interest from 6% to 12% subsequent to July 15th, 1928; nor is there any statement in the bonds in suit showing any right to, or reason for, raising the interest after July 15th, 1928, from 6% to 12%.

8. ERROR IN ADMISSION OF TESTIMONY.

Appellant has assigned (Assignment XIII) (Transcript p. 103) as error, the action of the trial Court in overruling the objection to the following question:

> "Q. Mr. McLaughlin, I now show you a certified copy of an assessment certificate against Mr. Carl O. Hader, for various amounts covering several years. I would like to have you look at that and tell me when that assessment certificate came to your office, if you know. You can refresh your recollection with it." (Transcript p. 58.)

Defendant Hughson objected to this question on the ground that it was irrelevant, immaterial and incompetent, so far as defendant Hughson was concerned, in that Hughson was not a party to any proceeding concerning which that certified copy was filed with the Collector of Internal Revenue at San Francisco. This is an action upon certain bonds. (Transcript pp. 58-59.)

We respectfully insist that the action of the Court, in overruling the objection to the question above set forth, was erroneous in this; Hughson did not figure at all in this matter, until the bonds were signed by him on the 25th day of August, 1925. Hader, the taxpayer, against whom the assessment was made, was not before the Court upon the trial of this action, as he was never served with a copy of the summons and complaint. We fail to see how any action taken by the Department prior to August 25th, 1925, could, in any way, affect the defendant and appellant William L. Hughson, or his liability on these bonds.

9. ERROR IN ADMISSION OF EVIDENCE.

In assignment of Errors XIV (Transcript p. 104), defendant and appellant William L. Hughson respectfully insists that the trial Court erred in overruling his objection to the question "Why not?" (Transcript p. 60), after the witness John P. McLaughlin, had testified, that between August, 1925, and March, 1928, he took no steps to collect these taxes from Hader.

Defendant Hughson objected to that question upon the ground that it called for the conclusion of the witness, and we fail to appreciate what influenced the mind of the Court to overrule the objection on the ground stated. In our humble judgment, use of the word "Why" necessarily calls for a conclusion.

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10. EVIDENCE IMPROPERLY ADMITTED.

In assignment of errors No. XV (Transcript p. 104), defendant and appellant Hughson assigns as error, the failure of the Court to strike out the words "which covered the claims" as they appear in witness McLaughlin's answer to the following question:

> "Q. Did you have any reason for not attempting to make collection upon this assessment?
>
> A. The fact that I had bonds which covered the claims, and that the claims were pending, and until the claims were rejected there should be no action. After that we could proceed at any time. We had to." (Transcript p. 60.)

Mr. McLaughlin did not qualify as an expert on legal questions and, as a matter of fact, whether or

not the bonds covered the claims, was one of the matters which was before the Court for consideration, and it was the Court's duty, and not Mr. McLaughlin's, to arrive at a conclusion as to whether or not the bonds covered the claims.

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11. PLAINTIFF'S EXHIBIT NO. 1, ASSESSMENT CERTIFICATE, IMPROPERLY ADMITTED IN EVIDENCE.

As set forth in assignment of errors XVI (Transcript p. 104), defendant and appellant Hughson objected to the ruling of the trial Court in admitting in evidence Plaintiff's Exhibit No. 1. (Transcript p. 62.)

The admission of this exhibit in evidence was objected to upon the ground that it was absolutely irrelevant, immaterial and incompetent so far as defendant Hughson is concerned, in that Hughson was not a party to any proceedings concerning which that certified copy was filed with the Collector of Internal Revenue, at San Francisco, California, and that the Government was limited in proving its cause of action in this case, to the introduction (Transcript pp. 62 and 58-59) of these bonds, the execution of which was admitted.

We respectfully insist that the introduction of this document in evidence, referring as it evidently does, to the assessment of taxes against Hader at a date prior to the 25th of August, 1925, cannot, in any way, affect any of the obligations of Mr. Hughson under these bonds executed subsequently thereto.

12. PLAINTIFF'S EXHIBIT NO. 2, "OFFER IN COMPROMISE" IMPROPERLY ADMITTED IN EVIDENCE.

We respectfully insist (Assignment of Errors XVII, Transcript p. 104) that the trial Court erred in admitting in evidence Plaintiff's Exhibit No. 2, for the reason that it was immaterial, incompetent, and irrelevant, so far as appellant Hughson was concerned, was not part of his original offer of January 15th, 1930, and could not, and did not, modify or vary said original offer of January 15th, 1930.

At the top of this "Offer in Compromise" (Transcript p. 71), over the printed words "Name of Taxpayer" appears in typewriting, "William L. Hughson," and two lines below the word "Sir," we read "Charges of violation of Law, or failure to meet an internal revenue obligation have been made against the taxpayer named above as follows: in settlement of Income Tax liability of Carl O. Hader for the years 1920 to 1924 inclusive.", and below this appears the following, "Date and place of alleged violation Jan. 25, 1930, San Francisco, Calif." (Transcript p. 71.)

In the first place, William L. Hughson is not involved in this matter as a taxpayer. There is not, and never was, any tax liability against him, by reason of any deficiency tax assessed against Hader. Hughson's liability, if any then existed, was solely contractual.

Secondly, this instrument, Plaintiff's Exhibit No. 2, is not an offer to compromise Hughson's liability as a surety upon these bonds, and this alone was the primary obligation incurred by Hughson, on which he would be liable, if any liability existed at all.

Thirdly, the alleged violation of law, sought to be compromised as appears in this offer, Plaintiff's Exhibit No. 2, is set forth as having occurred on January 25th, 1930. This is absolutely incorrect, immaterial, irrelevant and incompetent, and in conflict with extant facts, as that date is subsequent to the date of Hughson's check and subsequent to the date of the offer of compromise, Defendant's Exhibit No. 3, which Hughson's attorney, Mr. Harry F. Sullivan, sent to Washington. If any liability accrued at all against Hughson, it was certainly not a tax liability, and it accrued, if at all, as surety on these four bonds, on November 17th, 1925, upon the entry, by the Board of Tax Appeals, of its order dismissing Hader's appeal.

Fourthly, in Plaintiff's Exhibit No. 2, which is dated February 4th, 1930, is a statement that the sum of $100.00 is tendered as a compromise offer. As a matter of fact, there is no testimony that $100.00 was delivered by Mr. Hughson to the Collector of Internal Revenue, or to any person for him on February 4th, 1930, when this offer is claimed to have been made.

This "Offer in Compromise," Plaintiff's Exhibit No. 2, does not, in any way, refer to his obligation as a surety, which Hughson offered to compromise in the written offer, Defendant's Exhibit No. 3, forwarded by Mr. Sullivan for Hughson to the General Counsel of the Bureau of Internal Revenue at Washington, on January 15th, 1930. Furthermore, Hughson's check for $100.00 was made payable to the Commissioner of Internal Revenue, and was already endorsed and accepted by him, prior to the time that

Plaintiff's Exhibit No. 2 was signed. Hughson was not primarily interested, or concerned in settling Hader's tax liability to the Federal Government. Hughson was concerned however, in securing from the United States, and the Commissioner of Internal Revenue, a release from his liability as surety on these bonds.

At the time when Mr. McLaughlin, the Collecter of Internal Revenue, obtained Mr. Hughson's signature on this offer in compromise—Plaintiff's Exhibit No. 2—and for some time thereafter—in fact right down to the time the complaint was filed in this action, and even for sometime thereafter, Hader's obligation to pay the deficiency taxes assessed against him was still a valid, live, extant, binding, and enforcible obligation. The Commissioner of Internal Revenue and the Collector of Internal Revenue had not lost or waived any right to take appropriate proceedings against Hader at the time this action was initiated. Neither had the presentation or filing of these bonds, or the signing thereof by Hughson deceived or misled the Commissioner or the Collector of Internal Revenue, or directly or indirectly caused them to lose any existing right to proceed against Hader, upon Hader's primary liability.

Even after the Commissioner of Internal Revenue had accepted Hughson's check for $100.00, his act in so doing could not, and did not, operate to release Hader of his tax liability. Therefore, even after the acceptance of this sum of $100.00 from Hughson, the Commissioner and the Collector of Internal Revenue still had the right, and the time was still open, to take

appropriate proceedings against Hader to enforce his tax liability.

The liability of Hughson upon these four bonds was separate and distinct from the liability of Hader to pay the deficiency taxes assessed against him. While the payment by Hader of these deficiency taxes, or the settlement by Hader with the Government of his tax liability would have released Hughson as surety on the bonds, the release of Hughson as surety on the bonds would not have operated to release Hader of his tax liability.

We very earnestly, honestly, and candidly insist that we have clearly established beyond the peradventure of a doubt, that we have succeeded in not only showing, but proving conclusively, that inasmuch as Hader had no right to appeal, he perfected no appeal, and therefore, there was no consideration for the execution of the four bonds in suit, which were signed by the appellant Hughson.

With equal earnestness, we believe that we have unquestionably, established the fact that neither the abatement claims filed by Hader, nor the bonds, were filed within the time required by law and the rules of the Treasury Department, and that therefore, their filing did not operate to stay the hand of the Treasury Department in seeking the collection of the taxes due it from Hader.

We also believe we have presented indisputable proof that there was a complete accord and satisfaction between Hughson and the Commissioner of Internal Revenue, and that the acceptance by the Com-

missioner of Hughson's check for $100.00, under the proven circumstances, completely released Hughson from all liability on these bonds, even if the Court were to conclude that there was consideration for the bonds, and that the bonds were filed in time.

Quite frankly, we claim that this is a case in which, under all of the circumstances, appellant Hughson is justified and strictly within his rights in raising the defense of the Statute of Limitations. The bonds, if binding at all, became binding upon the dismissal of Hader's abortive appeal on the 17th of November, 1925, and this action was commenced more than five years thereafter.

As to the claims advanced by appellant Hughson, covering errors of the trial Court in admitting certain evidence, we say that as this action was based upon four certain, definite, specific, written contracts, the lower Court was not justified in admitting any evidence of any transaction or action of the Treasury Department occurring prior to the date on which these bonds were signed.

Concerning the twelfth point advanced by us in this brief, we feel satisfied that this Court, having scrutinized Plaintiff's Exhibit No. 2 in the light of the criticism which we have directed against it, will unquestionably appreciate the fact that as this exhibit does not refer to the actual liability which Hughson was seeking to compromise, it was improperly admitted in evidence, and served merely to confuse the Court in arriving at a conclusion as to the plea of accord and satisfaction which was advanced by appellant Hughson in the answer filed in this proceeding.

We humbly pray that this Court make its order reversing the judgment of the United States District Court in favor of appellee, and direct that judgment be entered in favor of appellant Hughson, for costs.

Dated, San Francisco,
January 25, 1932

Respectfully submitted,

HARRY F. SULLIVAN,
Attorney for Appellant.

No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Attorneys for Appellee.

Parker Printing Company, 545 Sansome Street, San Francisco

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No. 6644

IN THE

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WILLIAM L. HUGHSON,
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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The United States brought suit to recover judgment upon four bonds given by Carl Hader and William L. Hughson. Hughson appeared. Hader did not. A judgment was rendered against Hughson by the District Court for the Northern District of California, from which he took this appeal. There was a separate cause of action for each bond, the pleadings of all causes being similar in form. The answer to each cause of action was the same. We shall analyze the pleadings upon the first cause of action and shall

then consider the points urged by appellant as grounds for reversal of the judgment.

The issues raised by the pleadings were as follows:

Complaint (Rec. pp. 1-36)	*Answer of Defendant Hughson* (Rec. pp. 37-48)
Paragraph	
I — Sovereign capacity of Plaintiff.	I—Admitted.
II — Residence of defendants Hader and Hughson.	II—Admitted.
III—A suit founded on a contract, authorized by the Attorney General etc.	III—Admitted.
IV—On March 15, 1921, defendant Hader filed income tax return for 1920 disclosing tax liability for 1920 in the sum of $136.25, which was paid.	IV—Admitted.
V — Commissioner determined correct liability to be $1812.03 and made assessment in May, 1925, Special Assessment List, payment being demanded on May 15, 1925.	V—Admitted.
VI—(a) Defendant Hader filed appeal with Board of Tax Appeals and thereafter and on June 8, 1925, executed claim for abatement.	VI—(a) Admitted.
(b) Hader executed bond as principal and Hughson executed it as surety. Copy attached to complaint.	(b) Admitted; but denies that the bond became operative.

Complaint (Rec. pp. 1-36)	*Answer of Defendant Hughson* (Rec. pp. 37-48)
	(c) Denied.
(c) Bond was executed and delivered to the Collector "in consideration of the Collector refraining from enforcing immediate payment of the tax assessed as aforesaid."	
VII—On November 17, 1925, Board of Tax Appeals dismissed appeal for lack of jurisdiction. The Commissioner rejected Hader's claim in abatement on December 9, 1927, and so notified him. On July 14, 1928, the Collector advised defendant Hughson that Hader had failed to pay tax liability secured by bond and demanded payment from defendant Hughson of the amount due. Other demands made upon both defendants, failure to pay any part.	VII—All allegations of fact admitted but answer denies that there is any liability on the bond.

Thus the denials in the answer make one issue of fact, viz, whether the Collector, because of the bond, withheld collection and, secondly, an issue of law whether the bond was operative so as to impose a liability upon the defendant Hughson.

The answer also sets up affirmative defenses (1) that the cause of action is barred by Section 791, Title 28 of the United States Code; (2) that the bond was

never filed with nor accepted by the Collector as provided by law; (3) that the claim in abatement was not filed in time, was neither passed on nor approved by the Collector; and (4) lastly, that a compromise of the four claims for $100.00 was offered by the defendant Hughson to the Commissioner and was accepted by him.

Upon the issues of fact the trial court found that the bonds were delivered to the Collector of Internal Revenue and were duly accepted by him and by his superior officers, and that the Collector relied on the bonds and withheld collection (Finding II, Rec. p. 50). He further found that a compromise was offered by Mr. Hughson but was rejected by the Commissioner (Finding II, Rec. p. 51). The finding upon the compromise involves a mixed question of law and fact.

The other legal issues in the case are whether the bonds in suit became operative so as to impose liability on Mr. Hughson; whether the statute of limitations had run upon the right of action, and whether the rate of interest was properly computed in the judgment.

ARGUMENT.

I.

THE BONDS IN SUIT OPERATED TO IMPOSE LIABILITY UPON THE APPELLANT.

We have quoted in the appendix to this brief the bond which was sued upon in the first cause of action

and which was identical in form with the bonds sued upon in the second, third and fourth causes, saving as to the amounts. The same attack is made upon each bond. It is argued that there was no consideration; that the bonds were not properly accepted or approved by the Collector; and, lastly, that liability under the bonds did not attach because the claims in abatement of the taxes and the bonds were not filed within ten days of assessment of the deficiency as provided by statute and regulations. We shall answer these points in the order given above:

(a) The bonds were given for good consideration.

The United States offered in evidence a properly certified copy of the Assessment Certificate made by Commissioner D. H. Blair on May 14, 1925, wherein he assessed the defendant Hader with additional taxes as follows: for 1920 taxes $1,812.03; for 1921 taxes $1,323.11; for 1922 taxes $947.71, and for 1923 taxes $670.80 (see Pltf's Ex. 1, Rec. pp. 67 and 70). This assessment was received by the Collector in May, 1925 (Rec. p. 59), and was his authority for proceeding to collect the tax (see Sec. 102 of Title 26 U. S. Code Ann.).

On June 25, 1925, the taxpayer, Hader, filed with the Collector claims for abatement of the taxes (alleged in Paragraph VI and admitted in the answer). The mere filing of these claims did not stop the Collector from efforts to collect the taxes: there is no provision of the law which gives abatement claims such efficacy, and the collection might still proceed. The Collector,

Mr. McLaughlin, testified that Hader at the time of filing his claims in abatement filed bonds which were not acceptable in form (Tr. p. 59). These were returned to him, and Hader later filed the bonds in suit. This was in August, 1925 (Rec. p. 60). Their execution by Hader and Appellant Hughson has not been denied. Mr. McLaughlin testified that after these bonds were given, he took no further steps to collect the taxes until March, 1928 (Rec. p. 60). This was after the claims in abatement were rejected (see Paragraph VII). His reason for not proceeding with the collection of the tax was because he "had bonds which covered the claims, and the claims were pending, and until the claims were rejected there should be no action" (Rec. p. 60).

The bond recites that the exaction of payment at the time will result in great hardship upon the taxpayer and further refers to an extension of time for payment of the deficiency upon the giving of the bond. There was thus a promise upon the one side to pay the deficiency in tax, and upon the other side an extension of time which was coupled with forbearance of collection. No effort was made to collect the tax until after the Commissioner had ruled on the claims in abatement. The foregoing by one party of his right to resort to a remedy to which he is entitled has always been held to be a good consideration. It is hardly necessary to cite authority. See

Williston on Contracts, Vol. II, Sec. 135.

The fact that the promise was made by Mr. Hughson for the benefit of Hader, and by the Collector for the benefit of the United States, makes no difference in the rule. We direct also attention to the fact that Mr. Hughson's liability on the bond is not conditioned on Hader's liability to pay. It is direct. As far as the obligee of the bond is concerned, Mr. Hughson was equally liable with Hader.

Appellant's chief ground for urging that there was no consideration for Hughson's execution of the bonds is that the bonds were executed under the assumption that appeals to the Board of Tax Appeals had been perfected by Hader. (Appellant's Brief, p. 6.) Appellant points out that although Hader had in fact given notice of an appeal to the Board of Tax Appeals, his appeal was defective and the appeal was dismissed by the Board of Tax Appeals because it was taken prematurely (Vol. III, Board of Tax Appeals, p. 367). Appellant argues that his liability could not attach unless there was a valid appeal to the Board.

It seems to us that this argument almost answers itself. It is not disputed that an appeal had been taken and that the recital in the bond as to the fact of an appeal is correct. It is true that the appeal was not successful. But can it be argued with any degree of force that the consideration for the bond was that the defendant Hader prosecute his appeal successfully? If every surety could contend that his liability attached only in the event of a successful appeal, there would be no object in requiring bonds. It is in the

event of an unsuccessful appeal that the Collector and the Commissioner want the United States protected in its taxes. To the possible argument that there is a difference between an appeal which is successful in giving the appellate tribunal jurisdiction, and the appeal which is successful upon a trial of the merits before that tribunal, we would say that as far as purpose of a bond for payment of taxes is given, there is no difference at all. The object of the bond is to secure the United States in its taxes while its collector has foreborne to collect pending the appeal, whatever measure of success the appeal may have.

Besides, these bonds were of dual character. They purport to guarantee payment to the United States of the deficiency taxes assessed by the Commissioner of Internal Revenue, as well as serving for a bond for extension of time for payment. This is apparent upon examination of the face of the bond. Take the first bond as an example. The introductory paragraph states the names of the parties and recites that they are bound to the United States in the sum of $3,624.08. The second paragraph recites that additional income taxes from Mr. Hader are due, amounting to $1,812.03. The next paragraph recites that payment at this time will result in hardship. The fourth paragraph recites that under the statute an extension of time not to exceed eighteen months may be granted by the Commissioner, upon the giving of bond. Next follows a reference to the amount. Next follows the paragraph respecting the appeal. Then follows the conclusion:

> "Now, therefore, the condition of the foregoing option is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1920 as may be found due by the Commissioner, plus all penalties and interest, *in accordance with the terms of the extension granted,* and shall otherwise well and truly perform and observe all the duties of the law and the regulations, then it is to be void, otherwise to remain in full force and effect."

Thus it appears that both of the defendants bound themselves to pay the deficiency in tax if it were not paid on or before June 10, 1926. The obligation to pay was absolute, save for the extensions referred to in the bond, viz.: an extension of time under the statute (paragraph 4) and until the termination of an appeal to the Board of Tax Appeals.

In the case of

> *Miami Valley Fruit Co. v. U. S.,* 45 Fed. (2d) 303 (certiorari denied 283 U. S. 841),

decided by the Circuit Court of Appeals for the Fifth Circuit November 20, 1930, the suit was on a bond in form similar to the bonds in the present suit, except that no reference was made to an appeal to the Board of Tax Appeals. The bond merely referred to the extension of time for payment, a paragraph exactly like the present bonds. As to the consideration the Court said:

> "The plea of total want of consideration for the bond is also bad. Irrespective of the rules of

law concerning sealed instruments (no seal appears on this bond in the record, though its body recites one), the real consideration for giving it and for the sureties signing it was the extension of time for a year and the removal of the threat of distraint."

In the case at bar, there is no question that the collector, to whom this bond was offered and by whom it was accepted, withheld any further efforts to collect the tax, relying upon the bond. He so testified and there is no evidence to the contrary. The appellant Hughson, after making a representation in this bond as to the taking of an appeal, and after getting this extension of time, upon which representation the collector was expected to rely and did rely, is now seeking to show the representation in the bond was incorrect and that the extension of time was of no value. We think that he is estopped.

Appellant's brief relies on the case of

Clarke v. Mohr, 125 Cal. 540.

It is not in point. There were two bonds involved in that case. One of them was a bond purporting to be given upon an appeal from a motion denying a new trial. In fact it was given before the order denying the new trial was made. The other was a bond upon an appeal from a judgment. The first bond was held invalid. So far as the report of the case shows, a motion was made by the respondent to dismiss the appeal

because of the insufficiency of the bond, and there was no other consideration or matter involved.

Lastly, the case of

Robert's Sash & Door Co. v. U. S., 38 Fed. (2d) 716; affirmed 282 U. S. 812,

is directly to the contrary of appellant's contention. In that case the bond recited that the principal had filed or was about to file a claim in abatement. No claim was ever filed. It was argued that for this reason liability under the bond never attached. It was held immaterial whether or not such claim was filed, that the consideration for the bond was the fact that the tax was assessed and collection postponed because of the filing of the bond. This is exactly the situation in the case at bar.

(b) The bonds were approved and accepted by the Collector.

It is argued that the bonds were not approved by the Collector (Appellant's Brief p. 10). The court found otherwise (Finding II, Rec. p. 50) and his finding is amply sustained by Mr. McLaughlin's testimony (Rec. pp. 60-61). The suggestion that the Collector in order to make the bond effective must *write* his approval on the bond (instead of approving and accepting it by his actions) and that he must give formal notice of the approval to some one (to whom appellant does not say) may be dismissed as fanciful requirements imposed by this appellant, but not required by

the Collector's principal. Besides, the suit by the United States is a sufficient ratification of the act of its servant Collector.

Miami Valley Fruit Co. v. U. S., 45 Fed. (2d) at 306.

(c) **Delay in filing claims in abatement and bonds does not impair the validity of the bonds.**

It is argued that under the statute and the regulations, claims in abatement, together with bond, must be filed within ten days after demand for payment of deficiency taxes; that it was more than ten days after such demand that Hader filed his claim in abatement and more than ten days after filing the claims that the bond was given, and hence the bond was invalid (Appellant's Brief pp. 11-13).

We do not wish to dignify this argument by extended reply. There seems no good reason for denying to the Collector the power to extend time to taxpayers beyond the period fixed by law for filing tax returns, claims in abatement, and the like. As to the filing of bonds, the question is a practical one. A Collector who has made a demand for payment and has not succeeded in making a collection, ought to give a warm welcome to a bond with responsible surety whenever it is filed. Can any one imagine such a collector, a faithful servant of the United States, rejecting such a bond because it is tardy, and preferring to take his

chances upon a distraint proceeding, which he has no reason to think would be successful? Whatever can be said upon this, does it lie in the mouth of the taxpayer and his surety to complain of extensions of time given him and of favors and leniency in enforcing the law?

II.

THE SUIT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The bonds were executed and filed on August 25, 1925 (Rec. p. 60). The suit was filed on January 7, 1931 (Rec. p. 36).

It is argued that the cause of action accrued upon November 17, 1925, when the Board of Tax Appeals dismissed Hader's appeal, and that the governing statute of limitations is Section 791 of Title 28 of the United States Code Annotated, which provides a five-year period for suit or prosecution for a penalty, forfeiture, pecuniary or otherwise, running from the date when the cause of action accrued. This argument overlooks the fact that the bond fixes payment of the deficiency taxes by the principal on or before June 10, 1926, as its condition. If the United States could not have sued appellant Hughson prior to June 10, 1926, we are at a loss to see why the five year statute could be held to have run by January 7, 1931. Even on appellant's own theory the suit was filed in time.

It is sufficient, however, to say that Section 791 does not apply to a suit upon a bond and that there is no statute of limitations applicable to a bond given to stay the collection of taxes.

United States v. John Barth Co., 279 U. S. 370; 73 L. Ed. 743.

Congress has not provided a statute since the *Barth* case was decided, and that case is still controlling authority.

Appellant suggests that this suit is not based upon any sovereign rights of the United States. If this suit does not relate to sovereignty, we are curious to know what are the suits which come within the field of sovereignty.

III.

THE LIABILITY WAS NOT COMPROMISED.

The appellant Hughson proved the following facts, and they are undisputed: On January 15, 1930, his attorney wrote to the General Counsel of the Bureau of Internal Revenue, offering Mr. Hughson's check for $100.00 in full compromise of Mr. Hughson's liability upon the four bonds, and enclosing Mr. Hughson's affidavit in which he stated his reasons for thinking that the offered compromise should be accepted (Deft.'s Exhibits 3 and 4, Rec. pp. 92-96). It was also proved that the check, which was payable to the Com-

missioner, was endorsed by the Commmissioner to the Collector, without recourse, and on February 7, 1930, was cashed through the Hibernia Bank at San Francisco (Rec. p. 62). Mr. Hughson said that $100.00 had never been returned (Rec. p. 64), although he admitted the Collector tendered it (Rec. p. 64). This was all the defendant proved.

Quite aside from the evidence produced by the United States, the appellant failed to prove a legal compromise binding on the United States. This is because he has overlooked Section 3229 of the Revised Statutes (26 U. S. Code Ann., 158) which provides that the Commissioner may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon "with the advice and consent of the Secretary of the Treasury"; and after suit has been commenced "with the advice and consent of said Secretary and the recommendation of the Attorney General". The statute further requires the opinion of the Solicitor of Internal Revenue to be filed with the Commissioner giving his reasons for the compromise.

The Supreme Court recently passed on the effect of the statute in

Botany Worsted Mills v. U. S., 278 U. S. 282, 73 L. Ed. 379.

In that case the taxpayer and auditors of the Bureau of Internal Revenue, after several conferences, made a compromise as to the points of difference. The tax-

payer filed an amended return following the terms of the compromise, an additional assessment was made by the Commissioner in accordance with the amended return, which the taxpayer paid. Thereafter the taxpayer filed claim for a refund seeking to recover on account of one particular item of the amended return which was unfavorable to the taxpayer. The question was whether the agreement of compromise was binding without the consent of the Secretary of the Treasury and without the filing of the opinion of the Solicitor of Internal Revenue in the Commissioner's Office. The Supreme Court held that the statute was exclusive and that the compromise agreement bound neither the taxpayer nor the United States.

The cases cited by defendant upon the legal effect of cashing a check are interesting and, no doubt, good law in other fields. They cannot prevail in the face of a statute prescribing the methods for compromising a claim against the United States which has been held to prescribe the exclusive method.

Furthermore, the evidence introduced by plaintiff on rebuttal shows that the appellant Hughson modified his first offer in compromise by a subsequent offer which expressly incorporated the provisions of Section 3229 of the Revised Statutes (see Deft.'s Ex. 2, Rec. p. 71). This came about through the Commissioner's return of the first offer and check and the Collector's request that Hughson execute an offer upon

Form 656 (Rec. pp. 65, 66) which he did, Mr. Hughson admitting in court his signature upon such form (Rec. p. 64). Then, and only then, did the Collector cash the check and place it in a special deposit awaiting action upon the proposed compromise (Rec. p. 66). Thus under the terms of the offer itself liability was not released until accepted by the Commissioner with the advice and consent of the Secretary of the Treasury. All that appellant proved, under the most favorable aspect of the facts, is that the government retained the money without notifying him of a rejection of his offer in compromise. This is not enough. See

U. S. v. Drielinger, 21 Fed. (2d) at p. 213.

The appellant argues that the affidavit (Deft's Ex. 3, Rec. p. 92) and the "Offer in Compromise" (Pltf's Ex. 2, Rec. p. 71) refer to separate and distinct liabilities and have nothing to do with each other. The argument is answered by a mere reading of the two documents, and by remembering that only one check was ever tendered to accomplish the compromise.

The trial court was so manifestly correct in ruling against appellant's defense of accord and satisfaction that we confess to surprise that the argument is renewed in this court.

IV.

THE RATE OF INTEREST WAS CORRECTLY FIXED IN THE JUDGMENT.

The complaint asked for interest at 12% per annum from May 15, 1925. The interest rate was fixed at 6% per annum upon the principal sum from May 15, 1925 to July 15, 1928, and thereafter at 12% per annum. Appellant complains of the allowance of the 12% rate from July 15, 1928.

The bonds in suit impose liability for the deficiency in tax "plus all penalties and interest". They were given on August 18, 1925, when the Revenue Act of 1924 was in effect. The taxes themselves were assessed by the Commissioner on May 14, 1925 (Rec. p. 69), and related to taxes for the years 1920, 1921, 1922 and 1923. Under the provisions of Section 280 of the Revenue Act of 1924, the collection and payment of those taxes ("including the provisions in case of delinquency after notice and demand") are governed by the Revenue Act of 1924.

The applicable provisions of the Revenue Act of 1924 are these:

Section 274 (g) which provides that where an extension of time is given, interest runs on the deficiency at 6% for the period of the extension, and thereafter at 1% per month.

Section 276 (a) (2) which reads to the same effect.

Section 279 (a) which relates particularly to jeopardy assessments made under section 274 (d). (This was such an assessment. See Rec. p. 14, Paragraph IV, Complaint, and Assessment p. 70). Under the provisions of Section 279 (a) the taxpayer may file a claim in abatement of such jeopardy assessments, coupled with a bond. If the claim in abatement is denied in whole or in part then

> "as a part of the tax, interest at the rate of 6% per annum upon the amount of the claim denied from the date of notice and demand from the collection under subdivision (d) of Section 274 to the date of the notice and demand under subdivision (b) of this section. If the amount included in the notice and demand from the collection under subdivision (b) of this section is not paid in full within 10 days after such notice and demand, then there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 1 per centum per month (in the case of estates of incompetent, deceased or insolvent persons at the rate of 6 per centum per month) from the date of such notice and demand until paid."

(The demand referred to in Section 279 (b) is the notice and demand made by the Collector after the claim in abatement has been rejected in whole or in part.)

The provisions of Section 274 (k), 276 (a) (2) (b) and 279 (j) of the Act of 1926 provide for similar

rates, as do Section 273 (f) and Section 294 (a) (b) of the Revenue Act of 1928.

Let us apply the provisions of the Act of 1924 to the facts. The deficiencies were assessed on May 14, 1925 (Rec. p. 69). The Collector made demand for payment on May 15, 1925 (Complaint Paragraph V, Rec. p. 4, admitted in Answer). A claim for abatement was filed on June 25, 1925 (Complaint Par. VI, Rec. p. 4), which was rejected for the full amount on December 9, 1927 (Complaint Par. VIII, Rec. p. 6; admitted in the Answer), and Hader was notified of its rejection on the same day. The Collector notified appellant Hughson of its rejection on July 14, 1928, and demanded payment on the same day (Complaint Par. VII, Rec. p. 16, admitted in the Answer).

Under the statute, Hader was liable for interest upon the deficiencies at *6%* from the date of the Collector's demand on May 15, 1925, to the time when he was notified of the rejection of his claim in abatement on December 9, 1927, and thereafter at 1% per month. As Hughson had assumed liability to pay Hader's deficiency as found by the Commissioner, with interest, it would seem arguable that he was liable for exactly the same amount of interest as Hader. All doubts, however, were resolved in Mr. Hughson's favor and the trial court computed the interest with the utmost leniency possible under the law. Appellant's liability for interest was made to run at 6% from the expira-

tion of ten days after Hader received notice of the deficiency, up to the time that notice was personally given him that Hader had failed to pay the taxes and payment was demanded from him, that is, from May 25, 1925, to July 14, 1928. Then, only, the rate was made to run at 1% per month.

We submit that the fixing of the rate of interest was scrupulously fair (of which the appellee makes no complaint) and that the trial court could not in conscience fix the rate otherwise. The case of

Maryland Casualty Co. v. U. S., 49 Fed. (2d) 556, (certiorari denied October 19, 1931),

was a case involving the liability of a surety for interest at 12% under the 1918 Revenue Statute which contained provisions closely resembling the provisions cited above. The case is authority for calculating the period during which interest runs against the surety more strictly than was done in the case at bar.

CONCLUSION.

We submit that this appeal is peculiarly without merit. There is not a point urged in appellant's brief which has not been passed upon by the courts many times, or upon which there can be any reasonable doubt.

We ask that the judgment be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Appellee.

(APPENDIX FOLLOWS.

Appendix

(EX. A TO COMPLAINT.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Carl A. Hader, of San Francisco, California, as principal, and W. L. Hughson, as surety, are held and firmly bound unto the United States of America in the sum of Three Thousand Six Hundred Twenty-four and Six One-hundredths ($3624.06) Dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents:

WHEREAS, there is due from the above bounden principal, Carl A. Hader, for additional income tax for the year 1920 an aggregate of One Thousand Eight Hundred Twelve and Three One-hundredths ($1812.03) Dollars resulting from deficiency taxes which the Commissioner of Internal Revenue claims to be due because of fraud with intent to evade tax, but which taxpayer confidently asserts to be erroneous; and

WHEREAS, the exact payment of the deficiency in tax at this time by said Principal will result in undue hardship to him, and

WHEREAS, Section 274-G of the Revenue Act of 1924 provides that the Commissioner, with the approval of the Secretary may extend the time for the payment of such deficiency in tax or any part thereof for such period as may be considered necessary, not, however, in excess of eighteen months, and may require the tax-

payer to furnish a bond with sufficient sureties conditioned for the payment of the deficiency and interest thereon in accordance with the terms of the extension granted, and

WHEREAS, it appears that the amount of this bond is sufficient to cover the aggregate of the deficiency of taxes assessed against such principal for the year 1920, together with penalties and interest, and

WHEREAS, the principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year 1920, and desires that the payment of the deficiency in tax be extended until the determination of said appeal, as a matter of fairness and justice.

NOW, THEREFORE, the condition of the foregoing obligation is such that if the principal shall, on or before the 10th day of June, 1926, pay such deficiency in tax for the year 1920 as may be found due by the Commissioner, plus all penalties and interest, in accordance with the terms of the extension granted, and shall otherwise well and truly perform and observe all of the conditions of law and the regulations, then this obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals this 18th day of August, 1925.

C. A. HADER,
Principal.
W. L. HUGHSON,
Surety.

No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Attorney for Appellant and Petitioner.

PERNAU WALSH PRINTING CO., SAN FRANCISCO

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No. 6644

IN THE

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For the Ninth Circuit

WILLIAM L. HUGHSON,
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vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

William L. Hughson respectfully requests that this Honorable Court grant him a rehearing in the above entitled action, and bases such petition upon the grounds hereinafter set forth:

ACCORD AND SATISFACTION.

In view of the announcement by the Court, in its decision in this case, of an entirely novel theory of law, a theory entirely unsupported by any authorities, we respectfully, but honestly and earnestly, disagree with this Honorable Court, and feel that an opportunity should be afforded us to reconsider, with this

Court, on a rehearing, the question of whether the Federal Government should, or should not, be released from the operation and legal effect of the well known and definitely established doctrine of accord and satisfaction.

This Court, in considering the defense of accord and satisfaction interposed by Hughson, makes, in its decision, the statement that "the Collector who received the check had no authority to compromise the claim against the appellant by express agreement, much less by implication."

The statement just quoted is not fair to appellant Hughson, nor is it an accurate statement of the facts regarding the check. We believe that this matter should be reconsidered by the Court, and for that purpose, we now call the Court's attention to a statement of all of the facts in connection with the offer of compromise, Defendant's Exhibit No. 3. (Transcript p. 92.)

The record in this case (Transcript p. 95), unmistakeably indicates that the General Counsel for the Commissioner of Internal Revenue, on January 8th, 1930, requested Harry F. Sullivan, as attorney for William L. Houghson to take some definite action in the matter of settling Hughson's liability involved on these bonds. The record further shows (Transcript p. 96), that in response to the letter just mentioned, and on January 15th, 1930, said Sullivan forwarded to the General Counsel for the Commissioner of Internal Revenue a letter and offer of compromise and a check for $100.00.

This check as the record shows (Transcript p. 62), was payable, not to the Collector of Internal Revenue, but to the Commissioner of Internal Revenue. This check was endorsed by the Commissioner of Internal Revenue to whom it was payable, and thereafter, as it appears by the check itself, was endorsed by the Collector of Internal Revenue and by the Federal Reserve Bank. The money covered by that check unquestionably found its way into the United States Treasury.

At no time has appellant Hughson, or his Counsel, claimed that this one hundred (100) dollars was paid to the Collector of Internal Revenue by Hughson, but we do claim, and insist very earnestly upon our claims, that the check was payable to the Commissioner of Internal Revenue to whom the offer of compromise was submitted, as per request, and that the money finally found its way into the United States Treasury. We further insist, and the facts clearly support our contention, that there is no evidence in this record, because none exists, that either the Commissioner of Internal Revenue, or the General Counsel for the Commissioner, ever advised or notified either Sullivan or Hughson, of the rejection or acceptance, either qualified or absolute, of the offer of compromise.

Had Hughson merely given his check to the Collector of Internal Revenue at San Francisco, we would not now have the temerity to advance the theory that the Collector had authority to receive that check with an offer of compromise, and to act upon it.

The endorsement of Hughson's check by the Commissioner of Internal Revenue, and the deposit of the

funds represented by said check in the Treasury of the United States, constitutes, under the authorities, an acceptance of the $100.00 sent by Hughson, without any conditions being attached to its acceptance, other than those set forth in the offer of compromise of January 15th, 1930, together with Sullivan's letter which accompanied it. The unconditional acceptance by the Commissioner of the $100.00 from Hughson, and the acquiescence by the Secretary of the Treasury in allowing said $100.00 to go into the Treasury of the United States, unquestionably brings into full force and operation, the doctrine of accord and satisfaction, which is a perfect defense to the four causes of action set forth in the complaint on file in this action.

We likewise earnestly insist that the purported offer of February 4th, 1930, Plaintiff's Exhibit No. 2 (Transcript p. 71) is entitled to no consideration whatsoever by this Court in passing upon the points involved in a correct decision of this case. There is in the decision of this Court the entire absence of any comment on the variance between Plaintiff's Exhibit No. 2 and Defendant's Exhibit No. 3. (Transcript p. 92.)

LACK OF CONSIDERATION FOR BONDS.

The Court, in considering the question of lack, or failure of consideration for the execution of the bonds in suit, which was one of the defenses urged by Hughson in this action, bases that part or portion of its decision upon the decisions of the United States Supreme Court in the case of *Roberts Sash & Door*

Company v. U. S., 282 U. S. 812, and the *U. S. v. John Barth Company,* 279 U. S. 370.

The *Roberts* case (supra) was not an action brought by the Government seeking a recovery upon bonds, but was an action brought by the taxpayer to recover taxes actually paid, and collected after the Statute of Limitations had commenced to run. The question of the validity of the bonds was not before the Court for decision.

The *Barth* case (supra) involved solely the question as to whether or not a Statute of Limitations, which prevented the commencement of an action by the Government, for the collection of taxes was, or was not, applicable in an action brought by the Government, on a bond given by the taxpayer, for the express purpose of preventing the running of the Statute of Limitations. This case is not authority to the effect that any Statute of Limitations may, or may not be applicable in an action by the Government seeking recovery on bonds. The decision goes merely to the extent of determining that a particular Statute of Limitations, which might bar collection of taxes in a suit brought for that specific purpose, cannot be extended by implication, to a proceeding commenced by the Government directly on the bonds. The decision expressly provides that the execution and giving of the bonds gives the Government a separate and distinct cause of action, from an action to collect taxes.

ACTION UPON BONDS DISTINCT AND SEPARATE FROM ACTION FOR COLLECTION OF TAX.

And while discussing the *Barth* case (supra), we desire to call the attention of the Court to a particular statement in the decision in that case which should have great weight with this Court in granting a rehearing and in ultimately changing its decision herein.

The United States Supreme Court in the *Barth* case says "the object of the bond was not only to prevent the immediate collection of the tax but also to prevent the running of time against the Government."

Regarding the question of the running of the Statute of Limitations, we respectfully call this Court's attention to the fact that under the Revenue Act of 1924, which was the act in effect at the time the assessments were levied against Hader for these taxes, and under Section 278, Subdivision D of that Act, the Commissioner had six years after the assessment of the taxes within which to take direct action against the taxpayer. The assessment of these deficiency taxes against Hader was made by the Commissioner on May 14th, 1925. (Transcript p. 68.) The Commissioner therefore would not be barred by the Statute of Limitations until after the 14th of May, 1931.

Hughson's offer to compromise, Defendant's Exhibit No. 3 (Transcript p. 92), was made upon the 15th of January, 1930, and this action against Hughson on the bonds, was commenced on January 7th, 1931. Even at the time of the commencement of this action there still remained more than four months of that six year period within which the Commissioner

might have proceeded directly against Hader for the collection of these taxes.

The settlement of Hughson's liability on the bonds could not legally, in any way, have affected the right of the Commissioner to proceed against Hader, as it plainly appears as a matter of law, from the decision in the *Barth* case (supra), that the liability on such bonds is absolutely separate and distinct from the tax liability referred to in said bonds.

U. S. v. John Barth Co., 279 U. S. 370.

This is not one of that type of cases in which, due to an act of a surety in giving a bond, the Commissioner has lost his right to proceed against the taxpayer for the collection of the taxes.

This Honorable Court, in arriving at its decision in this case, evidently had in mind that the case was covered by the provisions of Section 606 of the Revenue Act of 1928, which Section 606 reads as follows:

> "(a) Authorization. The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.
>
> (b) Finality of agreements. If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except

upon a showing of fraud or malfeasance, or misrepresentation of a material fact— * * *."

HUGHSON'S COMPROMISE OFFER DID NOT REQUIRE APPROVAL BY SECRETARY OF TREASURY.

The acceptance by the Commissioner of Internal Revenue of Hughson's offer to compromise his liability as a surety on these bonds was not a closing agreement, or an offer to make a closing agreement such as is contemplated by the provisions of Section 606 of the Revenue Act of 1928, because upon the settlement with Hughson of his liability upon these bonds, the Government still had a right to proceed against Hader on his tax liability, which illustrates, quite clearly, that the settlement which Hughson sought was not a final closing agreement such as is contemplated by the above cited Section.

In support of its decision on this point, this Honorable Court relies upon the case of *Botany Worsted Mills v. U. S.*, 278 U. S. 282. We feel quite sure that this Court, upon reconsideration of the opinion in that case, will conclude as we have, that the Court, in the *Botany Worsted Mills* case was dealing with a purported closing agreement such as is contemplated in Section 606 of the Revenue Act of 1928, which agreement was made directly with the taxpayer. The Hughson case, now before the Court, as we just said in the preceding paragraph, does not involve a closing agreement between a taxpayer and the Government, and it is not an action in which any claim is advanced,

that a closing agreement was made or offered to be concluded, between a taxpayer and the Government as provided in Section 606. Hughson merely made an offer of compromise of a separate and distinct liability which is recognizzed and established by the United States Supreme Court in the *Barth* case.

U. S. v. John Barth Co., 279 U. S. 370.

The Hughson case now before the Court, as we just noted in the preceding paragraph, is not an action between the taxpayer and the Government involving the nonpayment of taxes, and is not an action in which any claim is advanced that a closing agreement was made or offered to be made between the Government and the taxpayer, regarding that tax, which is the agreement contemplated in Section 606 of the Revenue Act of 1928. In the case at bar, the admitted facts are that Hughson made an offer to compromise a contract liability entirely separate and distinct from the tax liability of Hader to the Federal Government. The distinction between this contract liability on a bond and the tax liability against the taxpayer is clearly recognized by the United States Supreme Court in the *Barth* case.

U. S. v. John Barth Co., 279 U. S. 370.

DEFENSE OF ACCORD AND SATISFACTION IS NOT SIMILAR TO DEFENSE OF STATUTE OF LIMITATIONS.

We respectfully insist that the United States has not, nor have the Courts, any right or authority, unless specifically so permitted, to abrogate such a well acknowledged and firmly established principle of law as that embraced in the title "accord and satisfaction."

We are not unmindful of the fact that a citizen defendant in an action brought by the United States in an attempt to enforce a sovereign right such as the collection of taxes, cannot successfully interpose the defense of the Statute of Limitations unless positively so authorized by statute.

This principle is just as well known and established as that of accord and satisfaction; but a citizen defendant is not deprived of his right to interpose the defense of the Statute of Limitations in an ordinary action on contract. He is only deprived of this right of defense in a case between him and the Government involving sovereign rights. This action is not one involving sovereign rights, but is simply and solely an action on contract between the Government on one side, and Hughson on the other, because of his execution of these four bonds as a surety. No rights as a sovereign were acquired by the Government, as against Hughson, by reason of his execution of these four bonds as a surety.

In conclusion, we respectfully, but earnestly insist that serious injustice will be done to the appellant in this proceeding, unless the Court in the execution of

its sound judicial discretion, sees fit to grant a rehearing on the points herein set forth.

Dated, San Francisco,
June 18, 1932.

HARRY F. SULLIVAN,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I, Harry F. Sullivan, attorney at law, duly licensed to practice as such in all the Courts of the State of California, and in the above entitled Court, hereby respectfully certify that I am the attorney for William L. Hughson, the appellant and petitioner herein, that I have prepared and read the foregoing petition for a rehearing, and that, in my judgment, the counts therein set forth are well founded, and that said petition is not interposed for the purpose of delay.

Dated, San Francisco,
June 18, 1932.

Respectfully submitted,
HARRY F. SULLIVAN,
Attorney for Appellant and Petitioner.

No. 6835

United States
Circuit Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb,
Respondent.

Transcript of Record

Upon Petition to Review the Decision of the United States Board of Tax Appeals

8/5/32 (60)

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 6835

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES OF ATTORNEYS.

ALFRED SUTRO, Esq., F. T. SMITH, Esq., V. K. BUTLER, Esq., ROBERT LITTLETON, Esq., For Taxpayer.

JOHN D. FOLEY, Esq., For Commissioner.

DOCKET ENTRIES.

1926

May 19—Petition received and filed.

" 21—Copy of petition served on solicitor.

" 21—Notification of receipt mailed taxpayer.

July 16—Answer filed by solicitor.

Aug. 25—Copy of answer served on taxpayer, general calendar.

1928

June 30—Hearing date set 10-23-28.

Oct. 17—Motion to transfer to reserve cal. filed by taxpayer. See 16117. Granted 10-18-28.

1929

Mar. 11—Hearing set 4-18-29.

Apr. 5—Motion to place on reserve cal. filed by G. C. See 16121. 4-8-29 granted.

" 8—Motion to place on reserve cal. filed by taxpayer. No action necessary.

Nov. 19—Hearing set Jan. 24, 1930.

" 26—Motion to place on cir. cal. for hearing in San Francisco, Cal., filed by taxpayer. See 16117.

" 29—Motion granted.

1930

Mar. 11—Hearing set May 19, 1930, San Francisco, Cal.

Apr. 19—Motion to consolidate with dkts. 16117 to 16122, 27940 to 27944 and 46510 to 46513 and to amend petition, amendment tendered, filed by taxpayer. 4-19-30 granted.

" 24—Copy of amended petition served on G. C.

May 19—Hearing had before Mr. Marquette. Submitted. Motion to consolidate for hearing and decision with dkts. 46510-11-12-27940-41-42-43-44-16117-18-19-20-21-22. Amended answer to be filed by respondent. (Dictated into record) briefs due Sept. 1, 1930.

Aug. 16—Stipulation for extension to 10-1-30 to file briefs filed. 8-22-30 granted.

" 19—Transcript of hearing of May 19, 1930 filed.

Sept. 25—Motion for extension to Oct. 15, 1930 to file brief filed by taxpayer. 9-29-30 granted. See 16117.

" 29—Brief filed by G. C.

Oct. 8—Motion for extension to Nov. 1, 1930 to file brief filed by taxpayer. 10-9-30 granted.

" 31—Request for findings of fact and brief filed by taxpayer. [1]*

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

1931

Feb. 11—Findings of fact and opinion rendered, John J. Marquette, Div. 1. Judgment will be entered under rule 50.

May 20—Notice of settlement filed by G. C.

" 25—Hearing set June 24, 1931, on settlement.

June 13—Consent to settlement filed by taxpayer.

" 25—Decision entered, John J. Marquette, Div. 1.

Dec. 22—Petition for review to U. S. Cir. Ct. of Ap. (9) with assignments of error filed by G. C.

" 22—Proof of service filed.

1932

Feb. 10—Motion for extension to Apr. 20, 1932 for preparation of evidence and delivery of record filed by G. C.

" 12—Order enlarging time to April 20, 1932, for preparation of evidence and delivery of record entered.

Mar. 17—Statement of evidence lodged.

" 19—Notice of lodgment of statement and of hearing Mar. 30, 1932, filed.

" 30—Hearing had before Miss Matthews on approval of statement of evidence. Motion of petitioner to continue granted to April 13, 1932.

" 30—Order of continuance to April 13, 1932 for hearing on approval of statement of evidence entered.

Apr. 12—Statement of evidence approved and ordered filed.

" 14—Praecipe with proof of service thereon filed.

" 18—Order entered extending time for transmission of record to May 20, 1932. [2]

United States Board of Tax Appeals.

Docket No. 16,120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:PA:1-60D-GWF-105) dated March 23, 1926, and as the basis of his proceeding alleges as follows:

1. Louise P. V. Whitcomb was, up to her death in 1921, a non-resident alien individual. John Freuler, Administrator of the decedent's Estate, is an individual residing in San Francisco, California.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on March 23, 1926.

3. The taxes in controversy are income taxes for the calendar year 1921 and for the amount of $723.60. [3]

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

The Commissioner in determining the taxable income of the decedent, up to the date of her death in 1921, added to her distributive share of the net income of the trust estate of A. C. Whitcomb, a portion of the depreciation and losses sustained by and allowable to the said Estate in determining its net income for the taxable year 1921.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A fiduciary return on Form 1041 was filed for the trust estate of A. C. Whitcomb for 1921 by the Trustee. In computing the net income of the said Estate and the distributive income of each beneficiary thereof, there were claimed as deductions $43,003.16 as depreciation on the physical assets of the Estate used in producing the income thereof, and $3,587.50 as losses sustained on the sale of Liberty Bonds, a total deduction of $46,590.66. In computing the distributive share of net income of each of the beneficiaries of the said Estate, including the petitioner, the Commissioner has added back to

such distributive share a proportionate part of the depreciation [4] and losses sustained by the Estate, the total depreciation and losses so added back being $46,590.66, of which $7,765.08 was added back to the distributive share of net income of the petitioner.

6. The propositions of law involved are these:

The income to be included in the individual return of the petitioner as income from the trust estate created by A. C. Whitcomb is limited to the petitioner's distributive share of the correctly computed net income of the Estate.

WHEREFORE, the petitioner prays that it be held by the Board that the error above mentioned was made by respondent and that no liability rests upon the petitioner to pay the taxes asserted in the notice of deficiency, and for such other relief as may appear equitable and proper as this cause progresses.

W. W. SPALDING,
Counsel for Petitioner,
Woodward Building,
Washington, D. C. [5]

State of California,
County of San Francisco.—ss.

John Freuler, being duly sworn, says that he is the duly appointed Administrator of the Estate of Louise P. V. Whitcomb, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the

statements therein contained; and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 11th day of May, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public. [6]

EXHIBIT "A"

Form NP-2

Treasury Department
Washington

IT:PA:1-60D Mar 23, 1926.
GWF-105

Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

Madam:

The determination of your income tax liability for the year 1921, as set forth in office letter dated February 8, 1926, disclosed a deficiency in tax amounting to $723.60.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be

mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assesment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:1, GWF-105-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair,

Enclosures: Commissioner.

Statement

Waiver - Form A By /s/ C. R. Nash

Form 882.

Assistant to the Commissioner. [7]

IT:PA:1-60D
GWF-105

Statement

In re: Louise P. V. Whitcomb,
c/o James Otis,
201 Sansome St.,
San Francisco, Calif.

1921

Deficiency in Tax—$723.60

An audit in connection with the fiduciary return of income, Form 1041, filed for the Estate of A. C. Whitcomb, discloses your distributive share of the net income of the estate as corrected to be $10,-019.97 instead of $2,254.89 as reported in your return. This amount has been reduced by $273.30, representing non-taxable Liberty Bond interest reported from the estate, leaving taxable distributive income of $9,746.67. The change is due to certain adjustments made in the fiduciary return, which are fully explained in a letter of this date addressed to Mr. James Otis, Trustee under the Will of A. C. Whitcomb, deceased.

Your taxable net income as corrected is $9,746.67 upon which the correct tax liability is $797.97. Since the records disclose a previous assessment of $74.37, there is a deficiency of $723.60.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

[Endorsed]: Filed May 19, 1926. [8]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits the allegations contained in paragraph 2 of the petition.

(3) Admits the allegations contained in paragraph 3 of the petition.

(4) Denies that he committed the error alleged in paragraph 4 of the petition.

(5) Admits that a fiduciary return was filed for the trust estate of A. C. Whitcomb, for the year 1921 by the trustee, that deductions on account of depreciation and losses on the sale of Liberty Bonds was claimed on such return in the amounts alleged in paragraph 5 of the petition, and that the Commissioner restored such deductions to income and thereby proportionately increased the distributive shares reported for the beneficiaries. Denies, however, that any loss was sustained on the sale of Liberty Bonds, or that if a loss was sustained, the amount thereof was $3,587.50, and further denies any depreciation was sustained or that if depreciation was sustained, the amount thereof was $43,003.16. Denies that the trustee was empowered or

required by the trust instruments to deduct depreciation for losses on the sale of capital assets in determining the distributive shares of the beneficiaries. [9]

(6) Denies generally and specifically each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
M. N. FISHER,
Special Attorney.

[Endorsed]: Filed July 16, 1926. [10]

United States Board of Tax Appeal.

	Docket
MARGUERITE T. WHITCOMB,	No. 16117
LOUIS A. WHITCOMB,	No. 16118
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16119
ESTATE OF LOUISE P. V. WHITCOMB,	No. 16120
LYDIA L. WHITCOMB,	No. 16121
CHARLOTTE A. W. LEPIC,	No. 16122
LOUISE A. F. E. WHITCOMB,	No. 27940
MARIE M. E. G. T. WHITCOMB,	No. 27941
ESTATE OF LOUISE P. V. WHITCOMB,	No. 27942
LYDIA L. I. WHITCOMB,	No. 27943
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 27944
LOUISE A. F. E. WHITCOMB,	No. 46513
LYDIA LOUISE IDA WHITCOMB,	No. 46511
MARIE M. E. G. WHITCOMB,	No. 46512
CHARLOTTE ANDREE WHITCOMB LEPIC,	No. 46510
Petitioners,	
vs.	
COMMISSIONER OF INTERNAL REVENUE,	
Respondent.	

CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

The above named petitioners hereby petition for a redetermination of the respective deficiencies set forth by the Commissioner of Internal Revenue in his notices of deficiency designated and dated as follows, to-wit:

(a) IT:PA:1-60D-GWF-105-March 23, 1926 (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926);

(b) IT:PA:1-60D-LVH-March 8, 1927;

(c) IT:AR:B-2:OVN-60D-November 4, 1929; and as a basis of their respective proceedings allege as [11] follows:

1. The respective petitioners are as follows:

(a) The petitioner, Louise Adolphine France Emmanuelle Whitcomb, also known as Louis A. Whitcomb (by error referred to in the male gender in the original petition filed in Docket No. 16,118) and also known as Louise A. F. E. Whitcomb, is a non-resident alien individual residing in France and is also a minor. John Freuler, an individual residing in the City of San Francisco, State of California and having his business address at 485 California Street in said City and State, is the duly qualified and acting guardian of the estate of the said petitioner.

(b) The petitioner, Lydia Louise Ida Whitcomb, also known as Lydia L. Whitcomb, and also known as Lydia L. I. Whitcomb, is a non-resident alien individual residing in France, and is also a minor. Said John Freuler is the duly qualified and acting guardian of the estate of said petitioner.

(c) The petitioner, Marguerite Marie Elizabeth Gabrielle Thuret Whitcomb, also known as Marguerite T. Whitcomb, also known as Marie M. E. G. T. Whitcomb, and also known as Marie M. E. G. Whitcomb, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-

of-Attorney to represent her in all matters pertaining to her federal income tax liability.

(d) The petitioner, Countess Charlotte Andree Whitcomb Lepic, also known as Charlotte A. W. Lepic, is a non-resident alien individual residing in France. Said John Freuler is her agent and she has duly authorized him by written Power-of-Attorney to [12] represent her in all matters pertaining to her federal income tax liability.

(e) The petitioner, John Freuler, Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, is the duly qualified and acting administrator of the estate of said decedent. Said decedent was, up to her death in 1921, a non-resident alien individual residing in France. Said John Freuler is an individual residing in San Francisco, California, as aforesaid.

(f) James Otis, is an individual residing in San Francisco, California, having his business address at 310 California Street in said City and State. Said James Otis is the sole duly qualified and acting trustee under the will of A. C. Whitcomb, deceased, from which all the income derived from sources within the United States by the respective petitioners has been and is now received.

2. The respective notices of deficiency are as follows:

(a) Six notices of deficiency of income tax for the calendar year 1921, each designated by the

symbols IT:PA:1-60D-GWF-105 and each dated March 23, 1926, (except the notice of $178.52 deficiency of Freuler, Administrator, which was dated March 24, 1926). Said respective notices of deficiency were mailed on or about said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic, Louise P. V. Whitcomb (petitioner Freuler's decedent) [13] and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "A," Exhibit "B," Exhibit "C," Exhibit "D," Exhibit "E" and Exhibit "F" respectively.

(b) Five notices of deficiency of income tax for the calendar years 1922 to 1925 inclusive each designated by the symbols IT:PA:1-60D-LVH, and each dated March 8, 1927. Said respective notices of deficiency were mailed on said date to the respective petitioners Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb, Charlotte A. W. Lepic and John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased. Copies of said notices are attached hereto, made a part hereof, and marked Exhibit "G," Exhibit "H," Exhibit "I," Exhibit "J" and Exhibit "K" respectively.

(c) Four notices of deficiency of income tax for the calendar year 1926, each designated by the

symbols IT:AR:B-2:OVN-60D, and each dated November 4, 1929. Said respective notices of deficiency were mailed on said date to the respective petitioners, Louise A. F. E. Whitcomb, Lydia L. I. Whitcomb, Marguerite Marie E. G. T. Whitcomb and Charlotte A. W. Lepic. Copies of said notices are attached here- [14] to, made a part hereof, and marked Exhibit "L," Exhibit "M," Exhibit "N" and Exhibit "O" respectively.

3. The taxes in controversy are income taxes of the respective petitioners for the respective taxable years and in the respective amounts as follows:

Each of the following taxpayers, namely,

(a) Louise A. F. E. Whitcomb,

(b) Lydia L. J. Whitcomb, and

(c) Marguerite Marie E. G. T. Whitcomb,

has the following amounts of taxes in controversy:

Proposed Deficiencies.

Year	Amount
1921	$487.58
1922	505.57
1923	401.95
1924	373.43
1925	303.83
1926	494.25
Total	$2,566.61

[15]

(d) Charlotte A. W. Lepic has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921	$ 2,300.44
1922	2,753.14
1923	2,399.50
1924	2,757.60
1925	2,006.36
1926	3,278.99
Total	$15,496.03

(e) John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, deceased, has the following amounts in controversy:

Proposed Deficiencies.

Year	Amount
1921 (prior to the death of petitioner's decedent)	$ 675.77
1921 (subsequent to death of petitioner's decedent)	162.58
1922	364.19
1923	281.92
1924	262.57
1925	251.27
Total	$1,998.30

The determination of tax set forth in each of said notices of deficiency is based upon the following errors: [16]

(a) Respondent erred in adding back to the net distributive income of each of the respective petitioners for the respective taxable years herein involved a portion of the depreciation sustained during said respective years by the trust estate created by the will of A. C. Whitcomb, deceased, which bore the same proportion to the total amount of depreciation so sustained that the income to which such petitioner was entitled under said trust bore to the total amount of distributive income therefrom.

Said total depreciation of said trust estate erroneously included by the respondent as aforesaid, as a part of the taxable net income of the petitioners is as follows:

Year	1921	1922	1923
Depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
Depreciation	$39,258.00	$39,108.00	$55,833.00

Said amounts so added back to the net income of the respective petitioners are, by years, as follows: [17]

Year	1921	1922	1923
L. A. F. E. Whitcomb	$5,574.48	$5,638.22	$5,838.22
L. L. I. Whitcomb	5,574.48	5,838.22	5,838.21
M.M.E.G. Whitcomb	5,574.49	5,838.22	5,838.21
C. A. W. Lepic	16,723.45	17,514.67	17,514.68
Estate of L. P. V. Whitcomb	(7,167.19		
	(2,389.07	4,378.67	4,378.68
Total depreciation	$43,003.16	$39,408.00	$39,408.00

Year	1924	1925	1926
L. A. F. E. Whitcomb	$5,816.00	$5,793.77	$9,305.50
L. L. I. Whitcomb	5,816.00	5,793.78	9,305.50
M. M. E. G. Whitcomb	5,816.00	5,793.78	9,305.50
C. A. W. Lepic	17,447.99	17,381.35	27,916.50
Estate of L. P. V. Whitcomb	4,362.01	4,345.33	
Total depreciation	$39,258.00	$39,108.01	$55,833.00

5. The facts upon which the respective petitioners rely as the basis of their respective proceedings are as follows:

(a) Petitioners, and each of them, are the life beneficiaries of the estate of A. C. Whitcomb, deceased.

A. C. Whitcomb died in the year 1889, or thereabouts, leaving a last will and testament, copy of which is attached hereto and marked Exhibit "P."

The last will and testament of A. C. Whitcomb, deceased, [18] was duly proved and probated in the Superior Court of the State of California, in and for the City and County of San Francisco.

The Executors named in the will of A. C. Whitcomb were Jerome Lincoln and Adolphus Darwin Tuttle, who were directed to carry out the provisions of said will and administer the Estate of A. C. Whitcomb as therein provided.

The income from the trust estate was paid in equal shares to Louise P. V. Whitcomb, Adolph Whitcomb and Charlotte A. W. Lepic until the death of Adolph Whitcomb, which occurred September 5, 1914. Thereafter and until the death of said Louise P. V. Whitcomb on June 14, 1921, the one-third share of the said Adolph Whitcomb in the income was paid in three equal parts to his widow, Marguerite Marie E. G. T. Whitcomb, and his two children, Lydia L. I. Whitcomb and Louise A. F. E. Whitcomb, petitioners herein; the remaining two-thirds of the income from the trust estate was paid in equal shares to Louise P. V. Whitcomb and Charlotte A. W. Lepic. From June 14, 1921, until on or about August 28, 1925, four-ninths of the total net income of said trust [19] estate was paid to said widow and said two children of Adolph Whitcomb, petitioners herein, an additional four-ninths thereof to Charlotte A. W. Lepic, petitioner herein, and the remaining one-ninth thereof to John Freuler, Administrator of the Estate of Louise P.

V. Whitcomb, deceased, petitioner herein. At all times herein mentioned since August 28, 1925, one-half of the income has been paid to said widow and two children of Adolph Whitcomb, petitioners herein, and the remaining one-half thereof to Charlotte A. W. Lepic, petitioner herein. Upon the death of Charlotte A. W. Lepic said trust will terminate and the remainder interests in the assets of said trust estate will vest in possession and enjoyment.

(b) The original Trustee of said Estate, provided for under Seventh Paragraph of the will of A. C. Whitcomb, was Jerome Lincoln, who had power to appoint his successors in trust. On or about the 3rd day of September, 1891, said Jerome Lincoln, acting under said power of appointment, by an instrument in writing, duly executed, given, and made, appointed Winfield S. Jones, Jerome B. Lincoln and James Otis to be his successors under said trust. [20]

On or about the 23rd day of February, 1896, the said Jerome Lincoln died, and said Winfield S. Jones, Jerome B. Lincoln and James Otis became Trustees of said trust. Thereafter the said Winfield S. Jones and Jerome B. Lincoln died, and James Otis became the sole surviving Trustee of said trust. At all times since the year 1905 said James Otis has been and now is the sole Trustee of said trust.

(c) On or about the 11th day of April, 1890, by decree of final distribution in the matter of

the Estate of said A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. An itemized list of said property so distributed is attached hereto, made a part hereof and marked Exhibit "Q."

Said property consisted almost entirely of assets of a character nondepreciable by wear, tear and exhaustion. On or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,907.42 together with the lots mentioned in Exhibit "Q" and other unimproved lots valued at approximately $19,000.00. During the years 1906 to 1924 inclusive said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00, thus changing a large part of the corpus [21] of said trust estate from property and assets of a nondepreciable character by wear, tear and exhaustion to property of a highly depreciable character by wear, tear and exhaustion. On November 12, 1928, James Otis, as said trustee, held only one unimproved lot, only $113,915.00 in bonds and stocks and only $66,000 in promissory notes.

(d) During the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduc-

tion to said Trust Estate, by the Bureau of Internal Revenue, in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Prior to the time that the Trustee of said Trust Estate converted the assets thereof from non-depreciable to depreciable property, it was the practice to distribute to the life beneficiaries thereof the entire net income therefrom. After said conversion, the surviving Trustee, James Otis, continued, on the advice of his attorney, to distribute the net income of said Estate to the life beneficiaries thereof without settling up a reserve to take care of depreciation sustained on depreciable assets. [22]

(e) On or about the 5th day of September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1918. On the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account and protested

against the said practice of said trustee in making distributions to the life beneficiaries of said estate without setting aside a reserve for said depreciation and for certain losses. On or about the 19th day of September, 1928, the said Superior Court allowed said objections in part and ordered that said trustee withhold annually, as a reserve for depreciation of the assets of said estate, such an amount as might be reasonable and proper and ordered that the respective petitioners repay to the said trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections, as the respective amount which should have been retained by said trustee as a reserve for depreciation for each of said years. A copy of said order is attached hereto, made a part hereof and marked Exhibit "R."

By said order the respective petitioners were legally [23] bound to repay to said trustee their respective distributive shares of the following respective amounts on account of depreciation sustained by the trust assets during the respective taxable years herein involved:

Year	1921	1922	1923
Amount	$43,003.16	$39,408.00	$39,408.00
Year	1924	1925	1926
Amount	$39,258.00	$39,108.00	$55,833.00

(f) Thereafter the respective petitioners repaid to said estate the total respective proportionate

amounts required of them with respect to the depreciation for the years 1913 to 1927, both inclusive, in the total amount of $622,434.11.

The respective amounts which each of the petitioners paid back to said estate on account of said depreciation for the taxable years herein involved are the respective proportional amounts of the depreciation of the assets of said trust estate erroneously added back by respondent, as aforesaid, to each of the petitioners' taxable net income for the taxable years herein involved. Since the petitioners received and were paid said amounts illegally under mistake of law and fact, and have returned the same to said trust estate, and were never legally entitled to receive any part thereof, and are not now [24] in receipt of the same or any part thereof, said amounts do not constitute taxable income of the respective petitioners. Respondent has refused and declined to compute the tax liability of petitioners in accordance with the aforesaid facts, which materially affect the determination of income derived from the trust estate; but has erroneously and wrongfully held that his former determination in reference to the tax liability should be adhered to and affirmed.

WHEREFORE, petitioners, and each of them, pray that this Board may hear their consolidated proceedings and that it be held by this Board that the errors above mentioned were made by respond-

ent and for such other relief as may appear equitable and proper as the cause progresses.

FELIX T. SMITH,
Counsel for Petitioners,
Standard Oil Bldg., San Francisco, Cal.

ROBERT A. LITTLETON,
Counsel for the Petitioners,
Tower Building, Washington, D. C.

LOUISE ADOLPHINE FRANCE EMMANUELLE WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor. [25]

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor.

MARGUERITE MARIE ELIZABETH GABRIELLE THURET WHITCOMB,
By JOHN FREULER,
Attorney in Fact.

CHARLOTTE ANDREE WHITCOMB LEPIC,
By JOHN FREULER,
Attorney in Fact.

JOHN FREULER,
Administrator of the will of Louise Palmyre Vion Whitcomb, deceased.

JAMES OTIS,
Trustee under the will of A. C. Whitcomb, deceased. [26]

State of California,
City and County of San Francisco.—ss.

John Freuler, being duly sworn, deposes and says: That he is the duly qualified and acting guardian of the Estate of Louise Adolphine France Emmanuelle Whitcomb, a non-resident minor and one of the above named petitioners; that he is the duly qualified and acting guardian of the Estate of Lydia Louise Ida Whitcomb, a non-resident minor and one of the above named petitioners; that he is the attorney in fact of Marguerite Marie Elisabeth Gabrielle Thuret Whitcomb, one of the above named petitioners, and is duly authorized by her, by her written power of attorney, to act for her in all matters pertaining to her federal income tax liability; that he is the attorney in fact of Charlotte Andree Whitcomb Lepic, one of the above named petitioners, and is duly authorized by her by written power of attorney to act for her in all matters pertaining to her federal income tax liability; that he is the duly qualified and acting Administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, one of the above named petitioners; that that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JOHN FREULER.

Subscribed and sworn to before me this 10th day of April, 1930.

[Seal] FRANK G. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. [27]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, says that he is the Trustee of the Estate of A. C. Whitcomb and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

JAMES OTIS.

Subscribed and sworn to before me this 10th day of April, 1930.

(Notarial Seal) FRANK G. OWEN,

Notary Public, in and for the City and County of San Francisco, State of California.

For deficiency letter, see original petition filed in this issue.

For Exhibits "P," "Q," and "R," see statement of evidence;

Appendix No. 1, Exhibit "A," Appendix No. 1, portion of Exhibit "B," "Real Property," and Appendix No. 7, respectively.

[Endorsed]: Filed April 19, 1930. [28]

[Title of Court and Cause.]

ANSWER TO CONSOLIDATED, AMENDED AND SUPPLEMENTAL PETITION.

Now comes the Commissioner of Internal Revenue, respondent herein, by C. M. Charest, General Counsel, Bureau of Internal Revenue, his attorney, and for answer to the consolidated, amended and supplemental petition heretofore filed admits and denies as follows:

1 (a), (b), (c), (d), (e) and (f). Admits the allegations of paragraphs 1 (a), (b), (c), (d), (e) and (f).

2 (a), (b) and (c). Admits the allegations of paragraphs 2 (a), (b) and (c).

3 (a), (b), (c), (d) and (e). Admits the allegations of paragraphs 3 (a), (b), (c), (d) and (e.)

Denies that he has committed error in his determination of the deficiencies herein involved. [29]

5 (a). Admits the allegations of paragraph 5(a).

5 (b). Admits the allegations of paragraph 5 (b).

5 (c). Answering the allegations of paragraph 5 (c) he admits that on or about April 11, 1890, by decree of final distribution in the matter of the Estate of A. C. Whitcomb, deceased, the Superior Court of the City and County of San Francisco, State of California, duly ordered and decreed that certain property be distributed in trust. Admits that an itemized list of said property so distibuted is attached to the petition as Exhibit Q. Admits

that on or about February 23, 1906, James Otis, as trustee of said trust estate, owned and held promissory notes, mortgages, bonds, corporate stocks and savings deposits in the aggregate value of $3,082,-907.42 together with the lots mentioned in Exhibit Q and other unimproved lots valued at approximately $19,000.00. Admits that during the years 1906 to 1924, inclusive, said trustee purchased and constructed hotels, buildings, improvements and hotel furniture and fixtures at a total cost of over $2,000,000.00. Denies the remaining allegations of paragraph 5 (c).

5 (d). Answering the allegations of paragraph 5 (d) he admits that during the years 1921 to 1926, inclusive, depreciation was sustained and allowed as a deduction to said trust estate by the Bureau of Internal Revenue in the following amounts:

1921	$43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00

Admits that in determining the amount of income of the trust which was distributable, the trustee did not take into account depreciation sustained [30] by the property of the trust estate. Denies the remaining allegations of paragraph 5 (d).

5 (e). Answering the allegations of paragraph 5 (e) he admits that on or about the 5th day of

September, 1928, the trustee of said estate filed in the Superior Court of the State of California, in and for the City and County of San Francisco, having jurisdiction of said estate, a petition for the settlement of his account of his trusteeship for the period from February 23, 1903 to February 23, 1928. Admits that on the hearing of said petition, Napoleon Charles Louis Lepic and Charlotte de Rochechouart, both of whom are remaindermen and not life-beneficiaries, objected to the approval of said account. Denies the remaining allegations of paragraph 5 (e).

5 (f). Denies the allegations of paragraph 5 (f).

Denies generally and specifically each and every allegation of said consolidated, amended and supplemental petition not hereinbefore expressly admitted, qualified or denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
By J. D. F.
Of Counsel.
JOHN D. FOLEY,
Special Attorney, Bureau of Internal Revenue.

Filed at Hearing May 19, 1930. [31]

A true copy: Teste B. D. Gamble, Clerk U. S. Board of Tax Appeals.

22 B. T. A. .....

United States Board of Tax Appeals.

MARGUERITE T. WHITCOMB, (MARIE M. E. G. and MARIE M. E. G. T. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LOUISE A. WHITCOMB, (LOUISE A. F. E. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

LYDIA L. WHITCOMB, (LYDIA L. I. WHITCOMB), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

ESTATE OF LOUISE P. V. WHITCOMB, Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

CHARLOTTE A. W. LEPIC, (CHARLOTTE ANDREE WHITCOMB LEPIC), Petitioner, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 16117, 16118, 16119, 16120, 16121, 16122, 27940, 27941, 27942, 27943, 27944, 46510, 46511, 46512 and 46513.

Promulgated February 11, 1931.

The petitioners are beneficiaries of a certain trust and entitled to the income thereof. The

trustee, in computing the net income of the trust for 1921 to 1926, inclusive, deducted certain amounts for exhaustion, wear and tear of the trust property, but distributed among the petitioners the amounts deducted for exhaustion, wear and tear, together with the net income so computed. Subsequently a court of competent jurisdiction in a proper suit brought by the remaindermen decided that the trustee should have retained the amounts for exhaustion, wear and tear of the trust property and ordered the petitioners to repay said amounts to the trustee. Held, that the amounts deducted for exhaustion, wear and tear of the trust property in the years 1921 to 1926, inclusive, were not income to the petitioners.

VINCENT K. BUTLER, JR., ESQ., ALFRED SUTRO, ESQ., and FELIX T. SMITH, ESQ., for the petitioners.

JOHN D. FOLEY, ESQ., for the respondent. [32]

These proceedings, which were duly consolidated for hearing and decision, are for the redetermination of deficiencies in income tax which the respondent has asserted as follows:

	1921	1922	1923	1924	1925	1926
guerite T. Whitcomb	$524.78	$562.61	$401.95	$373.43	$303.83	$494.25
ise A. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
ia L. Whitcomb	524.78	562.61	401.95	373.43	303.83	494.25
of Louise . V. Whitcomb	902.12	406.96	281.92	262.57	251.27	.....
rlotte A. W. Lepic	2,416.21	2,909.40	2,399.50	2,757.60	2,006.36	3,278.99

The petitioners allege that the respondent erred in adding to their respective incomes as returned by them for the years mentioned, the depreciation sustained during those years by a certain trust estate of which they were beneficiaries.

FINDINGS OF FACT.

Louise P. V. Whitcomb was from some time in 1889 until her death on June 14, 1921, the widow of A. C. Whitcomb, deceased. The petitioner Charlotte A. W. Lepic is the daughter of the said A. C. Whitcomb, deceased. The petitioners Marguerite T. Whitcomb, Louise A. Whitcomb, and Lydia L. Whitcomb, are the widow and two children of Adolph Whitcomb, deceased, who was the son of A. C. Whitcomb, deceased. [33]

The said A. C. Whitcomb died in the year 1889, a resident of the State of California, leaving a last will and testament which was duly admitted to probate and record by the Superior Court of the State of California, in and for the City and County of San Francisco. Said last will and testament provided, among other things, as follows:

> 7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb one-third part

> of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said will contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for.

James Otis was appointed a trustee of said trust on February 23, 1896. He has acted as such trustee continuously since that date, and since the year 1905 he has been the sole trustee of said trust. [34]

The original trust estate consisted largely of cash, bonds, stocks and notes. On February 23, 1906, the trust estate consisted of bonds, corporate stocks, cash and promissory notes secured by mortgages, of a total value of more than $3,000,000, and certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco

earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire, including those on the large parcel at Eighth and Market Streets which the trust still owns, and on which the Hotel Whitcomb now stands. Some time after the San Francisco fire the trustee of the said trust adopted the policy of improving the real estate owned by the trust, and of converting the other assets of the estate to accomplish that purpose. As a result of said policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The last item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee or trustees of said trust made payments of the income from the trust in equal shares to the widow and two children of A. C. Whitcomb, [35] until the death of his son Adolph, which occurred on September 5, 1914. The testator's widow, Louise P. V. Whitcomb, died on June 14, 1921. During the years 1921 to 1926, inclusive, the income from said estate was paid as follows:

1921	1/3	to Louise P. V. Whitcomb until her death on June 14, 1921, and thereafter 1/9 to her estate;
	1/3	to Charlotte A. W. Lepic until June 14, 1921, and thereafter 4/9;
	1/3	to the widow and two children of Adolph Whitcomb, namely Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb, until June 14, 1921, and thereafter 4/9;
1922)	1/9	to the estate of testator's widow,
)		Louise P. V.Whitcomb;
1923)		
)		
1924)	4/9	to the testator's daughter, Charlotte W. Lepic;
and)	4/9	to the widow and two children of the
1925)		testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb and Louise A. F. E. Whitcomb.
1926	1/2	to testator's daughter, Charlotte A. W. Lepic;
	1/2	to the widow and two children of the testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb.

The trustee of said trust filed fiduciary returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year, the respective amounts above set forth, repre-

senting exhaustion, wear and tear sustained by the trust. The trustee, however, did not withhold from the beneficiaries to whom income payments were being made, the amounts represented in the depreciation deduction, and each of said beneficiaries received her ratable share thereof during the years involved herein, as well as in preceding years. [36]

From 1903 to 1928, inclusive the trustee, or trustees of said trust presented an annual account to the beneficiaries entitled to income payments, but did not file any account in the Superior Court of California, which has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes.

On September 5, 1928, James Otis, as trustee of said trust, filed with the Superior Court in San Francisco, his account accompanied by a petition for its allowance. The account covered the period from February 23, 1903, to February 23, 1928, and it set out all of the payments made to the beneficiaries of said trust during that period.

The allowance and approval of said account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rochechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were duly filed with the Superior Court of the State of California, in and for the City and County

of San Francisco, they allege that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that said amount of $622,434.11 had been paid by the trustee to the beneficiaries of the trust entitled to the income therefrom, as income, thus impairing the trust property by that amount, and they prayed that the trustee be charged with that amount. All of the parties interested in said trust estate, including Harvard College, were notified of the filing of said account of said trustee, [37] and of said objections, and were represented by counsel at the hearing held thereon. On September 19, 1928, the Superior Court of the State of California, in and for the City and County of San Francisco, entered a decree in said matter, which is in part as follows:

> It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objections, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to-wit:

Year.	Amount.
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said Trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee [38] in making said disbursements without such deduction was entitled to rely upon said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said

Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made such disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

On January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart, executed and delivered to the said James Otis as trustee of said trust, their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made [39] had the trustee retained a reserve for depreciation of the trust property. Charlotte A. W. Lepic, Napoleon Charles Louis Lepic, and Charlotte de Rochechouart executed a joint note. The other notes were separate notes of the individuals concerned. These notes bear no interest and by their terms are payable at the termination of the trust, which will be upon the death of Charlotte A. W. Lepic. A payment of $10,700 has been made to the trust by the Estate of Louise P. V. Whitcomb.

The several petitioners in their returns of income for the years mentioned, did not include the amounts paid to them in those years by the trustee representing their proportionate share of the depreciation sustained and deducted on the fiduciary return of the estate. The respondent increased the income shown on the several returns by said proportionate share of said depreciation, and determined deficiencies in tax as hereinabove set forth.

OPINION.

MARQUETTE.—The sole question presented by the record herein is whether, under the circum-

stances set forth in the findings of fact, the petitioners in computing their respective incomes for the years 1921 to 1926, inclusive, should include therein that part of the amounts distributed to them by the trustee of the trust created by the last will and testament of A. C. Whitcomb, representing amounts deducted by the trustee in his fiduciary return on account of depreciation of [40] the trust property.

The pertinent statutory provisions are sections 219 (d) of the Revenue Act of 1921; 219 (b) (2) of the Revenue Act of 1924, and 219 (b) (2) of the Revenue Act of 1926.

1921 Act—Section 219 (d):

> * * * there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary.

1924 and 1926 Act—Section 219 (b) (2):

> There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the

> estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The intent of Congress in enacting the sections of law quoted was to tax each year to the beneficiary of any trust the share of the trust income which was distributable to him in that year, and to tax to the trustee in his fiduciary capacity any income which was not to be distributed. Anna M. Chambers, et al., 17 B. T. A. 820. We must therefore look to the will of A. C. Whitcomb to determine [41] what part of the income of the trust under consideration was distributable to the petitioners.

The trust which produced the income in question was created by the last will and testament of A. C. Whitcomb, and it and its trustee or trustees are within the jurisdiction of the Superior Court of the State of California, in and for the City and County of San Francisco, and the decree of that Court respecting the trust, when not reversed or modified by a tribunal having appropriate appellate jurisdiction, is binding upon all the parties interested in the trust. Its decrees with respect to the trust are also binding on the several Federal Courts.

Uterhart v. United States, 240 U. S. 598. That Court has determined and decreed that the trustee should have, prior to 1927, deducted from the gross income of the trust and retained in his possession amounts adequate to offset the depreciation of the trust property, and the trustee has been directed to deduct and retain amounts for depreciation in 1928 and thereafter. While the proceeding before the Superior Court may have been a friendly one, as is urged by counsel for the respondent, nevertheless all parties interested in the trust, including Harvard College, the contingent remainderman, were notified and appeared in person or by counsel, and the decree is binding on all of them and fixes the amount of income distributable to each beneficiary. Farewell v. Commissioner, 38 Fed. (2d), 791-795. And the judgment of the Court is that during the years 1921 to 1926, inclusive, the petitioners were entitled only to the income of the trust after deducting and setting [42] aside adequate amounts for depreciation of the trust property, and that they should repay to the trustee what they had received in excess of the proportionate share of the income so computed. In other words, no part of the payments made to them out of the amount deducted for depreciation belonged to them.

In the case of E. L. E. Brenneman, et al., 10 B. T. A. 544, we said in discussing a situation similar to the one here presented:

> We must, therefore, look to the will of L. A. Brenneman to discover what was the distribu-

table share of income of each of the petitioners. See Estate of Virginia I. Stern, supra. Paragraph (a) of the third clause of the will directs the trustees to "invest and from time to time re-invest the said trust estate * * *." And, in the same paragraph, it is provided that "the said trustees shall collect and receive the income or interest from said trust estate and pay out and disburse the same as hereinafter provided * * *." Paragraph (b) of the third clause directs the trustees "to set aside exclusively for the use of my wife, one-third of said trust estate * * * and to pay her annually during her natural life the net income or interest therefrom * * *." Paragraph (g) of the third clause directs that "when my son and daughter arrive at the age of twenty-one years the trustees shall annually thereafter pay to each of them his or her share of the income and interests on the trust estate, the payment to each to be proportionate to his or her share in said trust estate itself.

Prior to the years in question the trustees, with the acquiescence of the beneficiaries, interpreted the directions of the decedent to mean that only "net income" of the trust estate, as that term is used in the taxing statutes, should be distributed to the beneficiaries. Accordingly, they set up reserves to conserve the corpus of the trust. In 1917 and 1918, as well as the years in question, the trustees took deductions

for depreciation and depletion [43] of the oil-producing property and distributed to the beneficiaries only the net income so determined.

It is strenuously urged by the petitioners that the interpretation thus placed on the will cannot be collaterally attacked. It is undoubtedly true that as between the parties in interest an interpretation of long standing placed on the instrument by them will not be disturbed and the courts of Pennsylvania have so held. Appeal of Follmer, 37 Pa. 121; Hagerty v. Albright, 52 Pa. 274. We are not inclined therefore lightly to cast aside or disregard the interpretation placed upon the trust instrument by the parties thereto and adopt a contrary view as a basis for the taxes in question. See Grace Scripps Clark, 1 B. T. A. 491. We think that the decedent's will is susceptible of the interpretation placed thereon by the parties in interest and, consequently, we hold that the deductions for depreciation and depletion, the amounts of which are not in dispute, were properly taken by the trustees and do not constitute income to the beneficiaries. The respondent's action in restoring the amounts so taken as deductions by the trustees to taxable income of the respective beneficiaries is, therefore, reversed.

See also, Kate M. Simon, 10 B. T. A. 1186, John L. Whitehurst, 12 B. T. A. 1416; and Anna M. Chambers, et al., supra.

In the present proceeding the facts are much more favorable to the contention of the petitioners than were the facts in the Brenneman case, because in that case amounts for depreciation and depletion of the trust property were deducted and retained by the trustee pursuant to a construction placed upon the will by the beneficiaries, while in the instant proceeding the will was construed by the Courts and a decree entered announcing such construction and fixing the rights of the parties thereunder. [44]

It is also urged by counsel for the respondent that the beneficiaries have not repaid to the trustee the amounts which according to the decree of the Court were overpaid to them, but have given notes payable at the termination of the trust. This, however, does not in our opinion change the situation. The amounts in question did not belong to the petitioners, and in our theory of the law cannot be income to them. Whether the petitioners ever repay such amounts to the trustee is a matter between them and the trustee and the other parties interested in the trust.

It is our opinion that under the terms of the last will and testament of A. C. Whitcomb, the amount distributable annually to the petitioners herein during the years 1921 to 1926, inclusive, was the income of the trust computed by deducting from gross income amounts for depreciation of the trust property, and that the respondent erred in taxing to the

petitioners more than their proportionate share of the net income of the trust so computed.

Reviewed by the Board.

Judgment will be entered under Rule 50. [45]

MURDOCK (dissenting).—The decedent died in 1889 and the trust in question, so far as we know, began to function shortly thereafter. The account which was objected to covered only the period from February 23, 1903, to February 23, 1928. Prior accounts must have been approved in which there was no deduction for depreciation. Wear, tear and exhaustion of property, sometimes called depreciation, does not depend upon revenue acts. Yet, we see that the objection of those opposing the account related to depreciation which had been sustained from 1913 to 1927 only. 1913 was the first year that there was an income-tax act which might affect these petitioners. We must assume that during all of the years that the trust existed, up to the year 1928, the income from the trust property, undiminished by any amount representing depreciation, had been paid regularly to those having life estates. During the taxable years here in question no one made any objection to this action of the trustee, and he had the advice of counsel that under the terms of the trust it was his duty to distribute the full amount to those having life estates. The will made no specific provision for depreciation, and the general rule in such cases is that the life beneficiaries take all income undiminished by deprecia-

tion. In re Hoyt, 160 N. Y. 607, 55 N. E. 282; Devenney v. Devenney, 74 Ohio St. 96, 77 N. E. 688; Old Colony Trust Company v. Smith, Mass. , 165 N. E. 657; Blair v. Blair, 82 Kan. 464, 108 Pac. 827; Reed v. Longstreet, 71 N. J. Eq. 37, 63 Atl. 500; Dooley v. Penland, ... Tenn. ....., 300 S. W. 9. There is no reason to suppose that this testator in 1889 intended that the income from his estate should be reduced by depreciation before being distributed to the life beneficiaries. Gay v. Focke, 291 Fed. 721. No reserve [46] for depreciation was established or provided for by the trustee until several years after the taxable years involved. Then, apparently by mutual consent, a retroactive order of a Court was obtained as a result of which the trustee in January, 1929, for the first time, was enabled to show a reserve for depreciation of $622,-434.11 on his books although he had in his possession only $10,700 returned by the estate of Louise P. V. Whitcomb. Others to whom distributions had been made, including those who objected to the account, gave the trustee their notes bearing interest and payable only at the termination of the trust. These notes were supposed to restore to the trustee the balance of the amounts which had been distributed by him which in reality represented depreciation.

Louise P. V. Whitcomb, Charlotte A. W. Lepic and Marguerite T. Whitcomb were the petitioners in the case of Louise P. V. Whitcomb et al., 4 B. T. A. 80. That case involved the years 1917 to

1920. The petitioners there contended that under the same will which is involved in this case, the net income of the trust, the distributable share of which was taxable to the beneficiaries, was the statutory net income divided into the number of shares provided in the will. We there held, on April 23, 1926, that the life beneficiaries were taxable with their full distributable share of the income of the trust undiminished by depreciation. Marguerite T. Whitcomb appealed from the decision of the Board in that case as to the year 1918, to the Court of Appeals of the District of Columbia. The facts as to that year were similar to the facts before the Board in the present case. The Court in affirming the Board's decision, stated: [47]

> The appellant as life tenant in the trust estate was entitled to receive the full one-ninth of the income therefrom without regard to exhaustion or wear and tear of the corpus of the estate, and that is what appellant actually received from the trustee as her distributive share of the income. The trustee was not entitled to withhold any part of the income of the trust estate in order to make good the exhaustion or wear and tear of the capital assets of the estate; nor did the trustee in fact do so. Capital losses in such cases fall upon the reversioners or remaindermen, and not upon the life tenant. Therefore, the payment made by the trustee to appellant was in fact and law the distributive shares of the income to

> which she was entitled as life tenant, and consisted in no part of capital depreciation restored to her. It was therefore taxable in her hands. This conclusion is not negatived by the fact that the trustee was entitled to enter deductions for capital losses or gains in his return for the trust estate as a single entity.

This decision of the Court was rendered on April 2, 1928. Prior thereto, on January 14, 1925, the Circuit Court of Appeals, First Circuit, had decided similarly in Baltzell v. Mitchell, 3 Fed. (2d) 428, cert. denied 268 U. S. 690. Thereafter, on September 5, 1928, the trustee filed the account and the question of his duty to reserve depreciation was raised for the first time. There was a close family relation between the life beneficiaries and the remaindermen who made the objections to the account. It is easily conceivable that the only benefit sought from the Probate Court proceeding was support for the position taken by the life beneficiaries in excluding from their income tax returns the amounts representing depreciation, and thus avoidance of the effect of the adverse decisions of this Board and of the Court of Appeals of the District of Columbia on their income tax liability for other years. During all of those years the petitioners actually received and enjoyed the amounts here in controversy, and during those years they had no reason to suppose that their enjoyment of these amounts would ever be ques-

tioned. The [48] only reason that even a semblance of question arose was because some of those persons who were enjoying the amounts, in effect, asked the Probate Court to hold that they had no right to enjoy them, and nobody objecting, the Court so held. Under such circumstances, I do not believe that they should be relieved from including as a part of their gross income the full amount which they received and enjoyed during each of the taxable years in question. Cf. Jackson v. Smietanka, 272 Fed. 970; Lucas v. American Code Company, 280 U. S. 445; Commissioner v. Sanford & Brooks, ... U. S. ..... If the trustee erred in failing to deduct depreciation before distributing the income of this trust, the error had its inception long prior to the taxable years in question and long prior to 1913. The amount returned to the trustee in 1928 and the amount of the notes delivered to him at that time, then represent only a part of the amounts erroneously distributed, and there was no reason for holding that it was the amounts they received in the taxable years which they returned. The order of the Court will, of course, have its effect prospectively upon distributions, but under the circumstances of this case I do not think it should be given retroactive effect to accomplish the purpose sought by these petitioners. Cf. Weiss v. Wiener, 279 U. S. 333; Rosenberger v. McCaughn, 25 Fed. (2d) 699.

SMITH, STERNHAGEN, PHILLIPS, ARUNDELL and BLACK agree with this dissent. [49]

United States Board of Tax Appeals,
Washington.

Docket No. 16120

ESTATE OF LOUISE P. V. WHITCOMB,
Deceased,

By

JOHN FREULER, Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to findings of fact and opinion promulgated February 11, 1931, the respondent herein, to-wit, on May 20, 1931, having filed a proposed redetermination for the period January 1 to June 14, 1921, and the petitioner on June 13, 1931, having filed notice of acquiescence to the said proposed redetermination, it is

ORDERED AND RECEIVED that there is a deficiency for the period January 1 to June 14, 1921, in the amount of $95.61.

Enter.

Entered June 25, 1931.

(Signed) JOHN MARQUETTE,
Member.

A true copy. Teste, B. D. Gamble, Clerk U. S. Board of Tax Appeals. [50]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES David Burnet, Commissioner of Internal Revenue, by his attorneys, G. A. Youngquist, Assistant Attorney General, C. M. Charest, General Counsel, Bureau of Internal Revenue, and John D. Foley, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner for review (hereinafter referred to as the Commissioner) is the duly appointed and qualified Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent (hereinafter referred to as the administrator) is an individual inhabitant of the City of San Francisco, State of California, and is the duly appointed and acting administrator of the Estate of Louise P. V. Whitcomb, deceased. Said Louise P. V. Whitcomb, hereinafter referred to as the taxpayer, was up to the date of her death, on June 14, 1921, a citizen and resident of the French Republic.

II.

The Commissioner determined a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $723.60, and on March 23, 1926, in accordance with the provisions of sub-

division (a) of Section 283 of the Revenue Act of 1926, sent to said Louise P. V. Whitcomb by registered mail a notice of said deficiency. Thereafter the administrator duly appealed said notice of deficiency to the United States Board of Tax Appeals. Said appeal was heard by said Board on May 19, 1930. On February 11, 1931, said Board promulgated its interlocutory decision containing its findings of fact and opinion, and on June 25, 1931, entered its order of redetermination wherein it ordered and decided that there was a deficiency in income tax for the period from January 1, to June 14, 1921, in the amount of $95.61.

In the period from January 1, to June 14, 1921, said Louise P. V. Whitcomb was one of the beneficiaries of a trust established under the will of one A. C. Whitcomb, deceased. By the terms of said A. C. Whitcomb's will the income of the trust was required to be distributed among the beneficiaries thereof. During the calendar year 1921 the trust property sustained depreciation in the amount of $43,003.16. In distributing the [51] income of the trust among the beneficiaries, the trustee did not take into account the depreciation sustained by the property of the trust, but distributed to each beneficiary his or her proportionate part of the income of the trust without regard to any depreciation. The will of said A. C. Whitcomb was silent upon the question whether depreciation was to be taken into account in determining the income of the trust available for distribution among

the beneficiaries. On September 5, 1928, the trustee filed his account covering the period from February 23, 1913, to February 23, 1928, with the Superior Court for the City and County of San Francisco, California, together with a petition that the account be approved. The account was objected to by two of the remaindermen of the trust. On September 19, 1928, the Court entered a decree whereby it found that the trustee's action in not reserving necessary amounts for depreciation before distributing the income of the trust among the beneficiaries was improper and whereby it directed that the recipients of the income of the trust for the period from February 23, 1913, to February 23, 1927, pay back to the trustee the excess amounts received by them. The payment of $10,700.00 has been made on behalf of the Estate of Louise P. V. Whitcomb, but it does not appear from the record what year or years are covered by said payment.

III.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and order of redetermination promulgated and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision and order of redetermination and upon which he relies to reverse the said deci-

sion and order of redetermination so promulgated and entered by the Board of Tax Appeals, to-wit:

1. The Board erred in holding that the distributions made by the trustee to said Louise P. V. Whitcomb were not income to her in their entirety.

2. The Board erred in holding that the distributions of the income of the trust received by said Louise P. V. Whitcomb without diminution on account of depreciation sustained by the trust property were not taxable income to her in their entirety.

3. The Board erred in holding that a payment made in a subsequent year and not shown to have related to an alleged excessive depreciation in the taxable year had the effect of keeping any portion of the distribution in the taxable year from being income to the taxpayer.

4. The Board erred in holding that the decree of a Court passed in a subsequent year in a friendly suit to which the Government was not a party could affect the Government's right to income tax in the year in which the income was received.

5. The Board erred in not approving the deficiency proposed for assessment by the Commissioner. [52]

WHEREFORE, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the

clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

G. A. YOUNGQUIST,
Assistant Attorney General.
C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.
Of Counsel:
JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue.

United States of America,
District of Columbia—ss.

C. M. CHAREST, being duly sworn, says that he is General Counsel of the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

C. M. CHAREST.

Sworn and subscribed to before me this 21st day of December, 1931.

GEORGE W. KREIS,
Notary Public.

My commission expires November 12, 1932.

[Endorsed]: Filed December 22, 1931. [53]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: W. W. Spalding, Esq., Tower Building, Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of December, 1931, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of December, 1931.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 22nd day of December, 1931.

.....,

Respondent on Review.

W. W. SPALDING,

Attorney for Respondent on Review.

RAL

[Endorsed]: Filed December 22, 1931. [54]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable John J. Marquette, Member of the United States Board of Tax Appeals, on May 19, 1930, in San Francisco, California. V. K. Butler, Jr., Esq., Alfred Sutro, Esq., and Felix T. Smith, Esq., appeared for the respondent and John D. Foley, Special Attorney, Bureau of Internal Revenue, appeared for the petitioner.

Whereupon

JAMES OTIS,

a witness for respondent, testified as follows:

Direct Examination.

My name is James Otis. My address is 2231 Broadway, San Francisco, California. I am an importer and exporter, a member of the firm of Otis-McAllister Company. I am sole trustee of the trust created by the will of A. C. Whitcomb and have been so since 1896. I am the sole trustee. I recall that in 1928 I had occasion to prepare an affidavit setting out in narrative form the history of the trust estate investments made from the time of the creation of the trust until November, 1928, when the affidavit was made.

The witness identified a copy of said affidavit. Said copy was thereupon admitted in evidence as

respondent's exhibit No. 1, and is hereto attached as Appendix 1.

In 1928 I filed an account as trustee in the Probate Department of the Superior Court in San Francisco having jurisdiction of this trust. That is the account. The statements contained in that account and all the items listed therein are a correct statement and report of my trusteeship and of the payments made by me under it.

Said account was thereupon admitted in evidence as respondent's exhibit No. 2 and is hereto attached as Appendix 2.

I filed a petition for settlement of the account.

[55]

The witness then identified the petition of James Otis for the settlement of his 14th account as trustee and it was admitted in evidence as respondent's exhibit No. 3. It is hereto attached as Appendix 3.

The witness then identified "Objections to the 14th Account of James Otis as trustee, filed on behalf of Napoleon Lepic and Charlotte de Rochechouart." Said objections were thereupon admitted in evidence as respondent's exhibit No. 4 and are hereto attached as Appendix 4.

The witness then identified his answer filed to the objections to his account, which said answer was admitted in evidence as respondent's exhibit No. 5 and is hereto attached as Appendix 5.

The witness then identified a decree of the Superior Court of the State of California in and

for the City and County of San Francisco, settling the 14th account of James Otis as trustee, which said decree was admitted in evidence as respondent's exhibit No. 6 and is hereto attached to Appendix 6.

The witness then identified an amended order and decree settling the account, which said amended order and decree was admitted in evidence as respondent's exhibit No. 7 and is hereto attached as Appendix 7.

(By Mr. BUTLER.)

Q. The order and the decree and the amended order and decree settling the account directed the trustee to demand and obtain from the beneficiaries repayments of certain sums representing the amount of the depreciation reserve required to be set up by the Court, but which was decreed to have been paid improperly to the beneficiaries. Did you demand and obtain repayment from the beneficiaries, Mr. Otis?

A. I did.

Q. I exhibit to you, Mr. Otis, four promissory notes, which I will subsequently describe in detail, and ask you to identify them.

A. I do.

Q. Did you receive these notes from the persons who are described therein?

A. I did.

Q. Are the sums for which the notes are made the respective proportionate amounts of the depre-

ciation which you had paid to the beneficiaries, and which they were required to repay to you? [56]

A. They are.

The promissory note of Louise A. F. E. Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 9 and is hereto attached as Appendix 9.

The promissory note of Marie Marguerite Thuret Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 10 and is hereto attached to Appendix 10.

The promissory note of Lydia Louise Ida Whitcomb, dated January 17, 1929, payable to James Otis, trustee under the will of A. C. Whitcomb, deceased, was then admitted in evidence as respondent's exhibit No. 11 and is hereto attached as Appendix 11.

The promissory note of Charlotte Andree Whitcomb Lepic, dated January 17, 1929, payable to James Otis, in which note Napoleon Charles Louis Lepic and Charlotte de Rochechouart are named as joint makers, was then admitted in evidence as respondent's exhibit No. 8 and is hereto attached as Appendix 8.

The sums represented by these notes include the sums repayable to me with respect to the years 1921 to 1926. I also received a cash payment in

the amount of $10,700 from Mr. Freuler, the administrator of the estate of Mrs. Whitcomb, on behalf of said estate.

Mr. BUTLER.—Will it be stipulated that John Freuler, who is named in each of these promissory notes as attorney in fact of the respective makers was such attorney and is such attorney in fact? The original powers are on file with the Department, I believe.

Mr. FOLEY.—I so stipulate.

Mr. BUTLER.—The two notes which I have exhibited to Mr. Otis are two notes already introduced and identified, but they are signed by John Freuler, as guardian of Louise Ida Whitcomb and as guardian of Louise A. F. E. Whitcomb. Will it be stipulated that Mr. Freuler, as guardian, had authority to execute these notes and that he executed them as such guardian, and that the execution thereof was reported by him in his account in the matter of the guardianship proceedings in the Superior Court of San Francisco, and that the account was settled and the execution of the notes approved? I have certified copies of [57] the proceedings, and will be glad to exhibit them to counsel in support of the stipulation.

* * * * * * *

Mr. FOLEY.—That stipulation that you suggest is satisfactory.

On cross-examination the witness testified:

The only cash I have received from these beneficiaries is the payment of $10,700 from Mr. Freuler

as administrator of the estate of Louise P. V. Whitcomb. The others have given me notes which are payable at the termination of the trust. They have paid nothing on the notes up to date.

The Findings of Fact made by the Board of Tax Appeals insofar as they are not inconsistent with the foregoing are agreed to be correct and to be fully supported by substantial and competent evidence.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, C. M. Charest, General Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

W. W. SPALDING,
Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 12th day of April, 1932.

JOHN J. MARQUETTE,
Member, United States Board of Tax Appeals.

[58]

APPENDIX 1.

EXHIBIT 1.

AFFIDAVIT OF JAMES OTIS, TRUSTEE OF THE TRUST CREATED BY THE WILL OF A. C. WHITCOMB, DECEASED.

State of California,
City and County of San Francisco—ss.

James Otis, being first duly sworn, deposes and says:

That A. C. Whitcomb, deceased, by his last will, appointed one Jerome Lincoln trustee of the trust by said last will created, with power of appointment on the part of said Jerome Lincoln. That on or about the 3rd day of September, 1891, the said Jerome Lincoln, acting under his said power of appointment, by an instrument in writing, duly executed, given and made, appointed Winfield S. Jones, Jerome B. Lincoln and this deponent to be his successors in the said trust. That on or about the 23rd day of February, 1896, the said Jerome Lincoln died and the said Winfield S. Jones, Jerome B. Lincoln and this deponent became the trustees of said trust. That thereafter said Winfield S. Jones and said Jerome B. Lincoln died. That at all times since their deaths and since the year 1905, said James Otis has been the sole trustee of said trust.

That the last will and testament of said A. C. Whitcomb, deceased, was in the words and figures set forth in Exhibit "A," hereto annexed and made

a part hereof as completely as if herein particularly set forth. That the decree of final distribution of said estate in the Superior Court of the State of California, in and for the City and County of San Francisco, was in the words and figures set forth in Exhibit "B," hereto annexed and made part hereof as completely as if herein particularly set forth.

That on April 11, 1890, the lot and improvements at Pacific and Davis Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $70,000. That prior to the San Francisco fire of April, 1906, this deponent and his predecessor trustee, acting on behalf of the said trust, constructed improvements on said lot at a cost of $128,737., which were totally destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the total amount of $54,500. for damages to said improvements caused by said fire. That between December 7, 1906, and March 19, 1908, this deponent, acting as trustee of said trust, constructed a class "C" building on said lot at a cost of $176,852., said building having an estimated life of forty years. That between December 23, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed an additional improvement upon said lot at a cost of $3,294., which additional improvement will last only for the remaining life of the building.

That on April 11, 1890, the lot and improvements at Broadway and Front Street, San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $45,000. That said improvements were of slight value, and were destroyed by said fire of 1906. That no further improvements thereon were constructed by this deponent or his predecessor trustee prior to said San Francisco [60] fire. That on October 1, 1906, this deponent collected insurance in the amount of $4,900. for damages to said improvements caused by said fire. That in the year 1908 this deponent, acting as trustee of said trust, completed the construction of a building upon said lot, costing $122,846., said building having an estimated life of thirty-three and one-third years from said date. That between September 14, 1911, and January 24, 1913, this deponent, acting as trustee of said trust, constructed additional improvements thereto at a cost of $3,262., which improvements will last only for the remaining life of the building. That on May 6, 1919, said building was damaged by fire. That on January 21, 1919, this deponent, acting as trustee of said trust, completed the restoration of said building at a cost of $3,172.

That on April 11, 1890, the lot at Front and Green Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, was of the value of $45,000. That said lot remained in an unimproved condition at all times from said date until the San Francisco fire

of April, 1906. That between December 9, 1919, and January 20, 1920, this deponent, acting as trustee of said trust, constructed improvements upon the said lot at a cost of $25,408. That said improvements have an estimated life of thirty-three and one-third years from date of completion.

That on April 11, 1890, the lot and improvements at Market and Eighth Streets, in San Francisco, more particularly described in said decree of final distribution hereto attached, were of the value of $400,000. That prior to said San Francisco fire this deponent and his predecessor trustee, acting on behalf [61] of said trust, constructed improvements upon said lot at a cost of $118,259., which were destroyed by said fire. That in the year 1906, and in the months of September, October and December, this deponent collected insurance in the aggregate amount of $59,600. for damages to said improvements caused by said fire. That between June 5, 1906, and October 20, 1906, this deponent, acting as trustee of said trust, constructed improvements on said lot at a cost of $68,606. That between November 17, 1910, and May 26, 1913, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $713,385. That between March 31, 1916, and December 28, 1921, this deponent, acting as trustee of said trust, constructed additional improvements on said lot, costing $502,009. That between November 3, 1922, and December 30, 1924, this deponent, acting as trustee of said trust, constructed addi-

tional improvements on said lot at a cost of $295,238. That between March 14, 1923, and December 30, 1924, this deponent, acting as trustee of said trust, constructed additional improvements on said lot at a cost of $335,145. That said improvements are in the nature of a hotel with an estimated life of sixty years from March, 1917.

That in June, 1917, this deponent, acting as trustee of said trust, acquired improved property at Market and Eighth Streets, in San Francisco, in cancellation of the debt of a note of $163,000., and additional advances and costs in excess of $15,000. That the total value of said building was estimated to be $110,000., with an estimated life of eleven years from the date of acquirement.

That on November 21, 1917, this deponent, acting as trustee of said trust, acquired the Hotel Carlton, at Turk and Larkin Streets, San Francisco, by foreclosure proceedings in cancellation of a debt of $150,649., of which over $110,000 [62] is estimated as the cost of the building, said building having an estimated life of forty years from the date of acquisition thereof. That in 1920, during the months of January and February, this deponent received $160,000. from the sale of said lot and improvements.

That on November 21, 1917, this deponent acquired a lot on Grant Avenue fifty-seven feet north of Clay Street, in San Francisco, by foreclosure proceedings in cancellation of a debt of

$55,000. That on the same date this deponent sold said lot and received in exchange, in part payment, improved properties at 829 Broderick Street and 1622 McAllister Street, San Francisco. That the cost of the buildings on each of said lots to this deponent is estimated at $3,750. with an estimated life of ten years from the date of acquisition thereof. That on March 12, 1925, this deponent, acting as trustee of said trust, sold said property for $15,000.

That between the years 1916 and 1920, inclusive, this deponent, acting as trustee of said trust, purchased an auto bus and hotel furniture and fixtures at a cost in excess of $212,000.

That on March 23, 1917, and on January 7, 1920, this deponent, acting as trustee of said trust, sold water lots at Van Ness Avenue and Lewis Street, in San Francisco, for $29,000. and $38,000., respectively.

That most of the aforesaid assets and improvements were acquired and constructed by this deponent and/or his predecessor trustee, with proceeds derived from the conversion and sale of other capital assets of said trust. That most of the capital assets so sold and converted were bonds, mortgages [63] and other nonwasting and nondepreciating assets.

That on February 23, 1906, the following assets were held and possessed by this deponent as trustee of said trust.

That on said date this deponent, as trustee of said trust, owned bonds of the aggregate value of $1,762,000.

That on said date this deponent, as trustee of said trust, owned corporate stocks of an aggregate value of $83,482.50.

That on said date this deponent held $76,424.92, in cash for the account of said trust.

That on said date this deponent had $35,000. on deposit in savings banks for the account of said trust.

That on said date this deponent held promissory notes and mortgages due and owing to said trust in the aggregate amount of $1,126,000.

That on said date this deponent, as trustee of said trust, owned, in addition to the lots mentioned above and included in Exhibit "B," state title lands in San Francisco, valued at $1,200., Lake Merced lots, in San Francisco, valued at $6,300., and additional Northbeach lots, in San Francisco, valued at $11,150.

That between February 23, 1906, and the present date, all of the aforesaid promissory notes and mortgages, save one for $66,000., have matured and have been collected or foreclosed by this deponent as trustee of said trust, and all of said bonds have been sold or collected.

That at the present date the assets owned and held by this deponent as trustee of said trust consist almost entirely of improved real estate.

That at the present date the only unimproved real [64] estate held by this deponent as trustee of said trust consists of a lot at Front and Green Streets, San Francisco.

That at the present time the only promissory notes or mortgages held by this deponent, as trustee of said trust, consist of a mortgage in the sum of $66,000.

That at the present time the only bonds or securities held by this deponent, as trustee of said trust, consist in Spring Valley Water Company bonds in the amount of $15,000., and stock of Colusa County Bank, California, in the amount of $98,915.

That the aforesaid nondepreciable property consisting of unimproved realty, bonds, corporate stocks, bank deposits, cash on hand, promissory notes, and mortgages included among the assets of said trust on February 23, 1906, the aggregate value of which upon said date was $3,101,557.42, and the proceeds thereof, has practically all been applied in the erection and purchase of depreciating property consisting of improvements upon real property of said trust, and hotel furniture.

JAMES OTIS,
Trustee.

Subscribed and sworn to before me this 12th day of November, 1928.

[Seal] CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California. [65]

EXHIBIT "A."

I, Adolphus Carter Whitcomb of the City and County of San Francisco, State of California, United States of America, but temporarily stopping in Paris, France, do make this my last Olographic Will and Testament.

1st. I give to the San Francisco Protestant Orphan Asylum and to the Ladies Protection & Relief Society, both of said San Francisco, each the sum of Five Thousand Dollars, making in all the sum of Ten Thousand Dollars.

2nd. I give to Mrs. Sarah Brazer Berry, now or formerly of Washington City, D. C., the sum of Five Thousand Dollars; and, in addition, I release her from all indebtedness to me or my estate for her kindness to my brother and myself, after the May fire of 1861 at said San Francisco.

3rd. I give to Adolphus Darwin Tuttle of Hancock, New Hampshire, and to Henry Foster Whitcomb of Boston, Massachusetts, or to the survivor of them, One Hundred Thousand Dollars of my Chesapeake & Ohio Railroad Bonds to be held by them in *Trust,* nevertheless, to pay over semi-annually to my cousin Love Maria Whitcomb Willis, now or lately of Glenora, Yates County, New York, and to her daughter Edith, now or lately married, or to the survivor of them during their natural lives, the income therefrom, for their own separate use and behoof, free from the debts, charge or control of their husbands, with the remainder

or remainders thereof to their children, or grandchildren "per stirpes," if any be alive at the time of their death, and if none be alive, then the said remainder shall go to my heirs-at-law.

4th. I*n* give to my wife, Louise Palmyre Vion Whitcomb, Two Hundred Thousand Dollars ($200,000) of my Chesapeake & Ohio Railroad [66] Bonds, and I recommend her not to dispose of them, or to convert them, without the distinct advice of my friend, Mr. Bruce.

5th. I give to the town of Hancock, New Hampshire, for the maintaining of a free, public and un-sectarian library Ten Thousand Dollars of my Chesapeake & Ohio Railroad Bonds, and, also, to the said town the further sum of Ten Thousand Dollars of said Bonds, one-half thereof, or such part by the said one-half as may be considered necessary, for the reclamation and embellishment of the "Common," so-called in the village of said Hancock, and the rest of said Ten Thousand Dollars as a fund, of which the income shall be used for the increase and maintenance of said reclamation and embellishment.

6th. I give to my nephew the said Adolphus Darwin Tuttle and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the "Jimeno Rancho" so-called, wholly or partly in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom.

And I recommend to my said nephew to leave his portion thereof after his own death and the death of his wife, in *Trust* for the said Charles Whitcomb Tuttle and to his children, or descendants, if any be alive at the time of the death of his said son; and if there *by* none so alive, to Harvard College, Cambridge, Massachusetts, one-half of the income thereof, to be used by said College for the assistance of students of said College to complete their regular course therein, and the other half of the income thereof for the general uses of the College, apart, however, from any participation therein by the Divinity School. [67]

7th. I give to my hereinafter named Executor, Jerome Lincoln of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature, and not hereinbefore disposed of, after the payment of my debts, in *Trust,* nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her: one Adolph, born on or about the 23rd day of February, 1880, and the other Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three third parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children: and if none be alive at that time, to Harvard Col-

lege, in conformity with the provisions named or indicated in Section Six (6) of this Will, having reference to said Harvard College.

The said Lincoln is hereby authorized to pay out of said two-thirds parts, only such portion as he may deem meet, fit and proper for the education and maintenance of the two children, until they shall have arrived respectively at the age of twenty-one years, after which they shall be entitled to receive their portion of the yearly income or interest. And the said Lincoln is hereby authorized to appoint his successor or successors in this Trust.

Lastly, I hereby nominate the said Jerome Lincoln and the said Adolphus Darwin Tuttle as Executors of this Will, and I hereby expressly provide that no bond or bonds shall be required of them or either of them, for the performance of any duties under this will; and I hereby recognize the said two children of the said [68] Louise Palmyre Vion Whitcomb, born as aforesaid in or about 1880 and in or about 1882, as my children, and authorize them to take and bear my name.

IN WITNESS WHEREOF I have hereunto set my hand and seal to this Will, after having effaced the word "said" in the 11th line of the third page of this Will, all in my hand-writing, and upon six pages, numbered from one to six, this 11th day of July, One thousand Eight hundred and Eighty-seven (1887) at Paris, France.

Signed and Sealed in the presence of us, and in the presence of each other, who at the request of

the said A. C. Whitcomb, have hereunto set our hands the day and year last above written.
[Seal] ADOLPHUS CARTER WHITCOMB.
E. J. DE STA MARINA of San Francisco, Cala.
W. PEMBROKE FELRIDGE, Paris, France.
WM. F. NAST, St. Louis, Missouri. [69]

EXHIBIT "B."

In the Superior Court of the City and County of San Francisco, State of California.

In the Matter of the Estate of
A. C. Whitcomb,
Deceased.

DECREE.

Jerome Lincoln and Adolphus Darwin Tuttle, executors of the will of Adolphus Carter Whitcomb, the above named decedent, having heretofore, to wit: on the 24th day of March, 1890, rendered and filed herein a true account and report of their administration of said estate, which account was for final settlement, and having filed with said account a petition praying that said account be settled, allowed and approved by this Court, and that final distribution of said estate be made to the persons entitled thereto; and said petition coming on regularly to be heard on the 7th day of April, 1890, proof having been made to the satisfaction of the Court that due and legal notice of the hear-

ing of said petition for settlement of said account and final distribution had been given according to law and in the manner and for the time heretofore ordered and directed by the Court, and the hearing of application for final distribution having been regularly continued until this day;

NOW, on this 11th day of April, 1890, it appearing to the Court that all claims and debts against said decedent, all taxes on said estate, and all debts, expenses and charges of [70] administration of said estate have been fully paid and discharged by the said executors; and it appearing that under and in accordance with the order and decree of this Court made on the 30th day of September, 1889, the executors have paid over, distributed and delivered to the several legatees under said will the legacies in said will bequeathed to them respectively, to wit:

To the San Francisco Protestant Orphan Asylum and to the Ladies' Protection and Relief Society, both of San Francisco, California, each the sum of Five Thousand ($5,000) Dollars.

To Mrs. Sarah Brazer Berry, of Washington, D. C., the sum of Five Thousand ($5,000) Dollars.

To Adolphus Darwin Tuttle, of Hancock, New Hampshire, One Hundred Thousand ($100,000) Dollars of Chesapeake and Ohio Railroad Bonds, to hold the same as sole trustee for the benefit of Love Maria Whitcomb Willis, cousin of the testator, of Glenora, Yates County, New York, and her daughter Edith, upon the trust in said will set forth,

Henry Foster Whitcomb, named in said will as co-trustee with said Tuttle, having declined to act as such trustee, and having refused and renounced said trust.

To Louise Palmyre Vion Whitcomb, widow of the testator, Two Hundred Thousand ($200,000) Dollars of the Chesapeake and Ohio Railroad Bonds.

To the town of Hancock, New Hampshire, Twenty Thousand ($20,000) Dollars of said Chesapeake and Ohio Railroad Bonds, upon the trust and for the purposes in said will set forth.

And it appearing that said estate has now been fully administered by said executors, and that all the steps in said administration have been regularly had and taken and that said estate is now ready for distribution and in a condition to be closed.

And it further appearing that at the time of making and [71] balancing the final account so rendered the residue of money in the hands of the executors was the sum of Eighty Thousand Six Hundred and Fifty-five 19/100 ($80,655.19) that the executors have since received the sum of Seventeen Hundred and Eighty-four 87/100 Dollars, and disbursed the sum of Twenty-one Thousand Five Hundred and Forty-seven 30/100 Dollars as appears by the supplemental account filed herewith, leaving a balance now in the hands of the executors of Sixty Thousand Eight Hundred and Ninety-two 78/100; and

it appearing that the said supplemental account is true and correct and supported by proper vouchers.

And it appearing that of the real and personal property so ready for distribution in the hands of the executors a part consists of thirty-one forty-eighths (31-48) parts of the real property known as the "Jimeno Rancho," as particularly described in the inventory, together with the W. ½ of the S. W. ¼ of section 11; and the E. ½ of the S. E. ¼ of section 10; and the N. E. ¼ of N. E. ¼ of section 15, township 12 N., R. 1 E., which had been purchased by the decedent and the said Hagar with moneys arising from the "Jimeno Rancho," and had been by them incorporated with and made a part of said ranch and of 31-48 parts of the mortgages, contracts, moneys, debts and dues arising therefrom, now standing of record in the name of George Hagar, of Colusa, and ready to be conveyed by the said Hagar, according to his declaration of trust, made by him in writing, to the proper devisees of the said will, and includes moneys therefrom already paid into the hands of the executors by the said George Hagar, which last described moneys amount to the sum of Thirty-one Thousand (31,000) Dollars, all of which interest in the "Jimeno Rancho" and mortgages, contracts, moneys, debts and dues are hereinafter particularly described.

And it further appearing that the said will of said de- [72] cedent contained among other the following clause:

"6. I give to my nephew, the said Adolphus Darwin Tuttle, and to his son, Charles Whitcomb Tuttle, both of said Hancock, all my interest, whether real, personal or mixed, in the 'Jimeno Rancho', so called, wholly or partially in the Counties of Colusa and Sutter in said California, in all mortgages, contracts, debts or dues arising therefrom, and I recommend to my said nephew to leave his portion thereof, after his own death and the death of his wife, in trust for the said Charles Whitcomb Tuttle and to his children or descendants, if any be alive at the time of the death of his said son; and if there be none so alive, to Harvard College, Cambridge, Massachusetts; one-half of the income thereof to be used by said college for the assistance of students of said college to complete their regular course therein, and the other half of the income thereof for the general uses of the college, apart howfrom any participation therein by the Divinity School."

And application having been made to this Court to make a construction of the said clause of the will and to adjudge and determine in its decree of final distribution whether the one-half part of the interest of the decedent in and to the real and personal property of the said "Jimeno Rancho" is, by the said will, devised and bequeathed to the said Adolphus Darwin Tuttle in fee simple absolute, without restraint upon his power of alienation, or whether the recommendation in the said clause contained creates a trust binding upon him and

operating to create a remainder after his death and the death of his wife in favor of Charles Whitcomb Tuttle, his children or descendants, or Harvard College: and the Court at the said hearing of the petition for final distribution having heard and considered the claims of the respective parties argued by Edward J. Pringle, Esq., and Jerome [73] B. Lincoln, Esq., who appeared for the said Adolphus Darwin Tuttle, and claimed that the devise to him was absolute and without trust or restriction upon his power of alienation, and Sidney V. Smith, Esq., who appeared for the adverse parties, claiming that a trust was imposed upon the said Adolphus Darwin Tuttle, and a remainder created after the death of the said Adolphus Darwin Tuttle and his wife; and testimony having been taken in open Court and argument of counsel had on behalf of the respective parties, and the Court being fully advised in the matter;

And it further appearing that in and by his said will the decedent devised and bequeathed all the rest and residue of his property, real, personal and mixed, excepting what property the decedent had in France, to the said Jerome Lincoln, upon the trust hereinafter by this decree declared and imposed;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED that said supplemental account be, and the same is, hereby settled and approved, and it is further ordered, adjudged and decreed that the executors retain out of the

funds in their hands the sum of Fifty Dollars for payment of Clerk's fees and other expenses of closing the estate.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that thirty-one forty-eighths (31-48ths) of the real property in the Counties of Colusa and Yolo known as the "Jimeno Rancho," and of the mortgages, contracts, moneys, debts and dues arising, or that may arise therefrom, and the said sum of Thirty-one Thousand Dollars already paid therefrom into the hands of the executors by the said George Hagar be, and the same are, hereby distributed to the said Adolphus Darwin Tuttle and his son Charles Whitcomb Tuttle, of Hancock, New Hampshire, in fee simple absolute, to their own use and benefit, in equal shares. And the said George [74] Hagar, being present in open Court and admitting the trust aforesaid in favor of the devisees of the said will, is ordered, decreed and directed to make conveyance of the legal title thereof to the said Adolphus Darwin Tuttle and Charles Whitcomb Tuttle in fee simple absolute; the interest in the said "Jimeno Rancho" so distributed, and to be by the said Hagar conveyed, being described as follows:

Thirty-one forty-eighths (31-48) parts of Twenty-two Thousand and Sixty-one 08-100 Dollars ($22,061 08-100), the same being the moneys now in the hands of said George Hagar and arising from said "Jimeno Rancho."

LANDS IN THE COUNTY OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of lands in the County of Colusa, State of California, being parts of the rancho known as the "Jimeno Rancho" standing in the name of George Hagar, of Colusa, bounded and described as follows:

1st. Tract of land commencing at a point where the western boundary line of the Jimeno Rancho, as patented by the United States, intersects the boundary line between the Counties of Yolo and Colusa, and running thence eastwardly, along the line between the said counties to the Sacramento River; thence northwardly up the said river and following the meanderings thereof until the same intersects the northern boundary line of township 13 north, range 1 east, Mount Diablo B. and M.; and running thence westwardly, along said township line until the same intersects the western boundary line of the Jimeno Rancho; and thence along said western boundary line to the point of commencement; containing 6,809 acres more or less.

2nd. Tract of land commencing at the southwest corner of Sect. 34, T. 14 N., R. 1 E., M. D. B. & M.; and running thence [75] eastwardly, along the southern line of Section 34, and the southern line of Section 35 of same township to the Sacramento River; and running thence northwardly up the Sacramento River, and following the meandering thereof to the line running east and

west, and intersecting Section 35 in the middle of said section; thence westwardly along the said middle line of Section 35 and the middle line of Section 34 to the western line of said Section 34; and thence southwardly along the westerly line of Section 34, to the place of commencement; being the south half of Section 34, the southwest quarter of Section 35, and the fractional southeast quarter of Section 35, as marked on the official surveys of the United States, containing 514 acres, excepting therefrom 4 acres sold to Reclamation District No. 108, and situated at the southeast corner of fractional southeast quarter of said Section 35, bounding upon the west base of the levee along the Sacramento River and the southerly boundary line of Section 35.

3d. Tract of land commencing at a point on the Sacramento River at the northeast corner of lands of George Woods, being near the middle east and west line of Section 13, Township 15 North, Range 1 West, M. D. M. B & M., and running thence westwardly along said Woods' north line and the north line of Kilgore to the county road leading from Colusa to Meridian, near the middle east and west line of Section 14, same Township and Range; thence westwardly along said road and continuation thereof in a straight line to western boundary line Jimeno Patent in same Section 15; thence north a little more than 1½ miles to N. W. corner of Section 10, same Township and Range; thence east ½ mile along the south line of lands of Totman

& Tuson; thence north a little more than a mile to Sacramento River; thence down along and with the said river to a point of commencement; containing 2,366 acres.

4th. Tract of land commencing at northeast corner of southeast quarter of Section 9, Township 15 North, Range 1 West, M. D. B. & M.; thence westwardly ½ mile to the center of Section 9; thence [76] northwardly nearly 1½ miles along the eastern boundary line of lands of Peter Dolan to the Sacramento River; thence down along and with the Sacramento River about ½ mile to lands of ..... Tuson; thence southwardly along the west line of said lands of ..... Tuson to the northwest corner of Section 10, same Township and Range, thence south ½ mile to point of commencement, containing 427 and 66-100 acres.

5th. Tract of land commencing at northwest corner of Section 8, Township 15 North, Range 1 West, M. D. B. & M.; thence east along the northern boundary line of said section ½ mile; thence south along the eastern boundary line of the northwest quarter of Section 8 one-fourth of a mile; thence east through the middle of the northeast quarter of Section 8, and by a continuation in a straight line a little more than ½ mile to county road leading from Colusa to Meridian; thence in a general northwesterly direction along and with the center of said road a little more than ¾ of a mile to the southerly line of a tract of land of 1,280 acres,

known as the Belden Tract; thence northwestwardly along the said line of said Belden Tract about ¾ of a mile to lands of T. Marr; thence south about ¾ of a mile to point of commencement, containing 380 acres.

6th. Tract of land commencing at a point on the Sacramento River within Section 7, Township 16 North, Range 2 West, M. D. B. & M., which is the southeasterly corner of lands of Jo. Hamilton; thence west along the southerly line of said lands of Hamilton about 1½ miles to the county road leading from Colusa to Princeton; thence southerly and southeasterly along said county road about 1¾ miles to lands of J. B. de Jarnatt; thence northeasterly about 1¼ miles to the Sacramento River; thence up said river to point of commencement, containing about 1,100 acres. [77]

7th. Tract of land commencing at a stake marked L. M. 1 on the Sacramento River, on the dividing line between the Jimeno Rancho and the rancho known as Larkin's Children's Ranch; and running thence southwardly down the Sacramento River and along the meanderings thereof to a sycamore tree marked L. M. 8, in Section 24 of Township 17 North, Range 2 West, M. D. B. & M.; and thence due west to the western boundary line of the Jimeno Rancho of same township; thence north along said line of said Rancho 90 and 7-100 chains to the said dividing line between the Jimeno Rancho and the rancho of Larkin's children; and

thence eastwardly along said dividing line 131 and 30-100 chains to the point of commencement, containing 1,305 acres.

8th. Tract of land commencing at a point where the northerly line of Levee Street, as laid down on the Town Map of the Town of Colusa, intersects the county road from Colusa to Princeton, and running thence northwardly along said county road 825 feet to Sacramento River; thence southeastwardly down the said river, and following the meanderings thereof, to the point where the said river is intersected by the said northerly line of Levee Street, and thence westwardly along the said northerly line 770 feet to the point of commencement, containing 7¼ acres.

LANDS IN THE TOWN OF COLUSA.

The undivided thirty-one forty-eighths (31-48) parts of the following lands in the Town of Colusa, State of California, as per Official Map of the Town of Colusa, being portions of the Jimeno Rancho, all standing in the name of George Hagar, of Colusa: [78]

Whole Block	Block	1
Lots 2, 3, 4, 6, 7 and 8	"	2
" 1 and 2	"	3
" 6, 7 and 8	"	8
" 2, 3 and 8	"	9
" ½ interest in 4	"	9
Whole Block	"	10

Lots 1, 3 and 4	Block	12
" ½ interest in 2	"	12
" 3, 4 and 8	"	14
" 2 and 6	"	15
" ½ interest in 5 and 7	"	15
" 6 and 7	"	17
" 1, 2, 3, 5, 6 and 7	"	21
" 1, 2, 3 and 8	"	23
" ½ interest in 5	"	23
" 1, 2, 3, 4, 7 and 8	"	24
Whole Block	"	25
Lots 5, 6, 7 and 8	"	26
" 4	"	27
" ½ interest in 5 and 8	"	27
" 1, 3 and 4	"	28
" ½ interest in 2	"	28
" ½ interest in 1	"	29
" ½ interest in 1	"	30
" 4 and west half of 3	"	31
" west ½ of 1, 19 and 12 of east side of 2	"	32
" south ½ of 5 and east ½ of 6	"	32
Whole Block	"	37
Whole Block	"	38
Lots 1, 2, 3, 5, 6 and 8	"	39
" ½ interest in 4 and 7	"	39
" ½ interest in 8	"	41
" 8	"	45
Lots 8	"	46
" 8	"	47
" ½ interest in 6 and 7	"	47

Lots 6, 7 and 8.....Block 48
" 3, 4, 5, 6, 7 and 8..... " 49
" 1, 3, 4, 5, 6, 7 and 8..... " 50
" 1, 2, 3, 5, 6, 7 and 8..... " 51
" ½ interest in 4..... " 51
" 2, 3, 4, 5, 6, 7 and 8..... " 52
" 3, 5, 6, 7 and 8..... " 53
" ½ interest in 1 and 4..... " 53
" 3, 5, 6, 7 and 8..... " 54
" ½ interest in 8..... " 57
" 3, 4 and 6..... " 58
" ½ interest in 7..... " 58
" ½ interest in 7..... " 59
" 3, 4, 5, 6, 7 and 8..... " 60
½ interest in Whole Block..... " 61
Whole Block ..... " 62
Lots, 1, 4, 5, 7 and 8..... " 63
" ½ interest in 3 and 6..... " 63
" 1, 2, 3, 4, 5, 6 and 8..... " 64
" ½ interest in lot 7..... " 64
" 1, 2, 3, 4, 5 and 7..... " 65
" ½ interest in 6 and 8..... " 65
Whole Block ..... " 66
Lots 1, 2, 5, 6 and 7..... " 67
" 6 ..... " 68
" 7 ..... " 70
" ½ interest in 8..... " 70

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Lots 6 .....Block 71
Whole of Block ..... " 73
Whole of Block ..... " 74

Lots 1, 2, 3, 6 and 8.....Block 75
Lots ½ interest in 4, 5 and 7..... " 75
Whole of Block ..... " 76
Whole of Block ..... " 77
Whole of Block ..... " 78
Whole of Block ..... " 79
Lots 5, 6, 7 and 8..... " 80
" 5, 6 and 7..... " 81
" 7 and 8 ..... " 82
" ½ interest in 2, 3 and 6..... " 82
Whole of Block ..... " 83
" " ..... " 84
" " ..... " 86
" " ..... " 87
" " ..... " 88
" " ..... " 89
½ interest in Block..... " 90
Whole of Block ..... " 91
Lots 2, 5, 6, 7 and 8..... " 92
" 1, 2, 3, 5, 6 and 8..... " 95
" ½ interest in 4 and 7..... " 95
Whole of Block ..... " 96
" " ..... " 97
" " ..... " 98
" " ..... " 99
" " ..... " 100
Lots 2, 5, 7 and 8..... " 101
" ½ interest in 1, 3, 4 and 6..... " 101
Whole of Block ..... " 102
" " ..... " 103
" " ..... " 104

Whole of Block.....Block 105
" " ..... " 106
" " ..... " 107
" " ..... " 108
" " ..... " 109
" " ..... " 110
" " ..... " 111
" " ..... " 112
" " ..... " 113
" " ..... " 114
" " ..... " 115
" " ..... " 116
" " ..... " 117
" " ..... " 118
" " ..... " 119
" " ..... " 120
" " ..... " 121
" " ..... " 122
" " ..... " 123
" " ..... " 124
" " ..... " 128
" " ..... " 129
" " ..... " 130
" " ..... " 131
½ interest in whole of..... " 132

[80]

Whole of Block .....Block 133
" " ..... " 134
" " ..... " 135
" " ..... " 136
" " ..... " 137

Whole of Block	.....	Block 141
" "	.....	" 142
" "	.....	" 143
" "	.....	" 144
" "	.....	" 145
" "	.....	" 146
" "	.....	" 147
" "	.....	" 148
" "	.....	" 149
" "	.....	" 150

LANDS IN THE COUNTY OF YOLO.

The undivided thirty-one forty-eighths (31-48) parts of the following lands situated in the County of Yolo, State of California, standing in the name of George Hagar, of Colusa.

That certain piece or parcel of land, bounded and described as follows, to wit: Commencing at a point on the west bank of the Sacramento river where the same is intersected by the township line dividing townships 12 and 13 north, range 1 east, M. D. B. and M., also being the dividing line between the counties of Colusa and Yolo; thence running down along and with said river to a point where said river is intersected by a line running north and south through the center of Sec. 30, township 12 north, range 2 east; thence running south through the center of said Sec. 30, and by a continuation and in a straight line through a portion of Sec. 31, same township and range, to a slough known as "Sycamore Slough," said slough being the back or

westerly boundary line of the Jimeno Rancho; thence northwesterly along and with said slough and the back or westerly boundary line of said rancho to the north line of Sec. 22 in township 12 north, range 1 east, M. D. B. and M.: thence north 1¾ miles; thence west, ½ mile; thence north ¼ mile; thence west, ½ mile; thence north one mile to said township line between the counties of Colusa and Yolo, and thence east [81] along said township line to the point of commencement. Excepting therefrom five hundred and twenty-nine and six one hundredths acres, now or lately of J. P. Bullock, being the south ½ of south ½ of section 2; the south ½ of south ½ of section 3, and southeast ¼ of southeast ¼ of section 4, all in township 12 north, range 1 east, M. D. B. and M., and the irregular tract bounded on the north and east by the Sacramento river, and on the south by the Sacramento river and the southern boundary line of section 1, in the same township; and on the west by the western boundary line of said section 1. The said tract of land containing, after deducting the said exceptions, 5,615.54 acres.

The undivided thirty-one forty-eighths (31.48) parts of following promissory notes secured by mortgage:

Note of M. A. and O. J. Kilgore to Geo. Hagar for $1,326.68 for moneys due by said Kilgores, being debt arising from Jimeno Rancho, dated November 1st, 1883—$4,582., due one-third Nov. 1st, 1884-85-86, bearing interest, etc., 9 per cent. per annum,

balance due $1,326.68. The same being secured by mortgage upon portion of Jimeno Ranch sold to mortgagor.

Note of S. R. Murdock to Geo. Hagar for $200, for moneys due by said Murdock, being debt arising from Jimeno Ranch, dated Feb. 15th, 1888, due 12 months from date, bearing interest at ten (10) per cent. per annum, balance due Oct. 1st, 1889, $234. The same being secured by mortgage upon a portion of Jimeno Rancho sold to mortgagor.

Note of Jno. W. Browning to Geo. Hagar, for $13,367, for moneys due by said Browning, being debt arising from Jimeno Rancho, dated Oct. 31st, 1885, $32,300, due balance in 1889-90-91, bearing interest at 9 per cent. per annum, balance due Oct. 1st, 1889, $13,367,—$5000 paid Oct. 12th, 1889. The same being secured by [82] mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of E. G. Morton to Geo. Hagar for $14,000, for money due by said Morton, being debt arising from Jimeno Rancho, dated October 23rd, 1888, due 1889-90-91, bearing interest at 9 per cent. per annum, balance due, $14,000. The same being secured by mortgage upon portion of Jimeno Rancho sold to mortgagor.

Note of H. J. Thomas to Geo. Hagar for $600, for moneys due by said Thomas, being debt arising from Jimeno Rancho, dated Dec. 29th, 1888, due 1889-90-91, bearing interest at 10 per cent. per annum; balance due $600. The same being secured

by mortgage upon portion of Jimeno Rancho sold to mortgagor.

The undivided thirty-one forty-eighths (31-48) part of the following promissory notes:

Note of E. J. Sabin to Geo. Hagar for $500, for moneys due by said Sabin, being debt arising from Jimeno Rancho, dated Dec. 5th, 1888, due Dec. 6th, 1888, bearing interest at 10 per cent. per annum; balance due, $500.

Note of D. C. Kilgore to Geo. Hagar for $46.47, for moneys due by said Kilgore, being debt arising from Jimeno Rancho, dated Nov. 3d, 1887, due Nov. 4th, 1887, bearing interest at 10 per cent. per annum; balance due $46.47.

Note of J. C. Frasier to Geo. Hagar for $138, for moneys due by said Frasier, being debt arising from Jimeno Rancho, dated Dec. 31st, 1887, due January 1st, 1888, bearing interest at 10 per cent. per annum; balance due, $138.

Note of M. Wallrath to Geo. Hagar for $270, for moneys due by said Wallrath, being debt arising from Jimeno Rancho, dated Oct. 10th, 1888, due Oct. 11th, 1888, bearing interest at 8 per cent per annum; balance due $270. [83]

Note of S. S. Hine to Geo. Hagar for $97.55, for moneys due by said Hine, being debt arising from Jimeno Rancho, dated Feb. 25th, 1889, due Feb. 26th, 1889, bearing interest at 10 per cent per annum; balance due, $97.55.

Note of E. J. Morton to Geo. Hagar for $177.92 for money due by said Morton, being debt arising from Jimeno Rancho, dated Oct. 23rd, 1888, due Oct. 24th, 1888, bearing interest at 9 per cent per annum; balance due, $177.92.

The undivided thirty-one forty-eighth (31-48) parts of the following amounts due by sundry parties to Geo. Hagar for account of Jimeno Rancho, being debts arising from Jimeno Rancho, as follows, to-wit: From

Colusa Milling Co., accrued September 5th, 1889, $502.50

Adolph Entremont, accrued September 1st, 1889, $352.50

Cooper, accrued June 1st, 1889, $60.

D. N. Angier, accrued October 15th, 1888, balance due, $206.34

T. Marr, accrued February, 1889, $525.00

J. B. Danner, accrued February, 1889, $492.66

Colusa & L. R. R., accrued July and September, 1889, $508.84

The undivided thirty-one forty-eighths (31-48) part of the following lots of grain, product of the Jimeno Rancho:

1,197 sacks wheat, 162,960 pounds in Howell Davis' warehouse

824 sacks wheat, 117,930 pounds, same warehouse.

690 sacks of wheat, Mumma Bros.

533 " barley, Mumma Bros.

397 " " M. E. Phillips

300	sacks	barley, S. W. Boyer
333	"	wheat, S. W. Boyer
130	"	barley, J. M. Miller
516	"	wheat, J. M. Miller
2,261	"	" C. M. Mumma
289	"	barley, C. M. Mumma
504	"	wheat, Vincy
151	"	barley, Vincy
316	"	wheat, J. C. Frasier
526	"	barley, J. C. Frasier
708	"	barley, A. E. Potter
559	"	wheat, A. E. Potter

Together with thirty-one forty-eighths (31-48) parts of any other mortgages, contracts, moneys, debts or dues arising or that may arise from the said "Jimeno Rancho" and not herein particularly described.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that [84] all the rest and residue of the estate of said decedent, real, personal or mixed, of every kind and nature, now known or hereafter discovered, except what property the decedent may have in France, the said property in France never having come into the possession of the said executors, be, and the same is hereby distributed to Jerome Lincoln, of San Francisco, State of California, in trust, nevertheless, to pay over to the said wife of said decedent, Louise Palmyre Vion Whitcomb, one-third part of the interest thereof or income therefrom, for and dur-

ing her natural life, and the other two-thirds parts to the children of said decedent born of her—one, Adolphe Whitcomb, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree Whitcomb, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants per stirpes of the said two children, if any be alive at the time of the death of the said two children, and if none be alive at that time to Harvard College, Cambridge, Massachusetts, one-half of the income thereof to be used by said college for the asistance of students to complete their regular course therein, and the other half of the income thereof for the general uses of the college—apart, however, from any participation therein by the Divinity School; but the said Jerome Lincoln is hereby authorized to pay out of said income only such portion as he may deem meet, fit and proper for the education and maintenance of the said two children until they shall arrive at the age of twenty-one years, after which time they shall be entitled to receive their portions of the yearly income or interest.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Jerome Lincoln be, and he is, hereby authorized to appoint a successor or successors in this trust. [85]

The following is a particular description of said rest and residue of said estate, so distributed to said Jerome Lincoln: $29,842.76/100 being balance of

moneys, to-wit: $60,842.76 less $31,000. distributed to A. D. and C. W. Tuttle.

REAL PROPERTY.

Lands in the City and County of San Francisco, State of California.

1st. Lot of land, commencing at the southeast corner of Davis and Pacific Streets, and running thence eastwardly along the southerly line of Pacific street one hundred and thirty-seven feet and six inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Clark street, thence westwardly along the said line of Clark street one hundred and thirty-seven feet and six inches to the easterly line of Davis street, and thence northwardly along said line of Davis street one hundred and twenty feet to the point of commencement.

2nd. Lot of land, commencing at the southeast corner of Broadway and Front streets, and running thence eastwardly along the southerly line of Broadway street ninety-one feet and eight inches, thence at right angles southwardly one hundred and twenty feet to the northerly line of Chambers street, thence westwardly along said line of Chambers street ninety-one feet and eight inches to the easterly line of Front street, and thence northwardly along said line of Front street one hundred and twenty feet to the point of commencement.

3rd. Lot of land, commencing at the southwest corner of Front and Green streets, and running

thence southwardly along the westerly line of Front street ninety-one feet and eight inches, thence at right angles westwardly two hundred and seventy-[86] five feet to the easterly line of Battery street, thence northwardly along said line of Battery street forty-five feet and ten inches, thence at right angles eastwardly one hundred and thirty-seven feet and six inches, thence at right angles northwardly forty-five feet and ten inches to the southerly line of Green street; thence eastwardly along said southerly line of Green street one hundred and thirty-seven feet and six inches to the point of commencement; being Beach and Water lots Nos. 2, 7 and 8.

4th. Lot of land, commencing at a point on the southeasterly line of Market street, distant thereon seventy-five feet southwestwardly from the southerly corner of Market and Eighth streets, running thence southwestwardly along said line of Market street two hundred feet; thence at right angles southeastwardly two hundred and seventy-five feet; thence at right angles northeastwardly one hundred and fifty-five feet, thence at right angles northwestwardly one hundred and five feet to the northwesterly line of Stevenson street; thence northeastwardly along said line of Stevenson street forty-five feet; thence at right angles northwestwardly one hundred and seventy feet to the point of commencement; being a portion of Block 414.

5th. Lot of land, commencing at the southeast corner of Van Ness Avenue and Lewis street, and running thence eastwardly along the southerly line

of Lewis street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue, and running thence northwardly, along said line of Van Ness avenue one hundred and thirty-seven feet and six inches to the point of commencement; being the northern ½ of Western Addition Block No. 35. [87]

6th. Lot of land, commencing at the southeast corner of Van Ness avenue and Jefferson street, and running thence eastwardly along the southerly line of Jefferson street three hundred and eighty-four feet to the westerly line of Polk street; thence southwardly along said line of Polk street one hundred and thirty-seven feet and six inches; thence at right angles westwardly three hundred and eighty-four feet to the easterly line of Van Ness avenue; and running thence northwardly, along said line of Van Ness avenue, one hundred and thirty-seven feet and six inches to the point of commencement; being the northern half of Western Addition Block No. 37.

7th. Lot of land, commencing at point where the northerly line of Lewis street intersects the westerly line of Polk street extended northward; and running thence westerly, along the northerly line of Lewis street four hundred and twelve feet and six inches to the easterly line of Van Ness avenue extended northwardly; thence northwardly, along said extended line of Van Ness avenue to Ship's chan-

nel; thence at right angles eastwardly along Ship's channel four hundred and twelve feet and six inches to the westerly line of Polk street as extended northwardly; and thence southwardly, along said extended line of Polk street to the point of commencement.

8th. Lot of land, commencing at the southwest corner section 35, township 2 south, range 6 west; thence north, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence east, 15.83 chains; thence south, 40 chains; thence west, 15.83 chains to point of commencement; containing 63.32 acres, according to the official surveys of the United States.

9th. Lots of land, being Lots numbers four hundred and twenty-one (421), four hundred and twenty-two (422) and four hundred and twenty-three (423), of Gift Map number four (4), as delineated in the official surveys of the City and County of San Francisco.

10th. Lots of land, being the State title or reversionary title [88] of Lots numbers nineteen (19), thirty-nine (39) and forty-three (43) of the City Slip property of the City and County of San Francisco, as delineated upon the map of the official survey of said City and County.

PERSONAL PROPERTY.

Bonds and Script.

No. 1. 1230 First Mortgage gold bonds of the reorganized Chesapeake and Ohio Railway Co., of $1,000 each, bearing interest at 5 per cent. per annum and payable in fifty years.

No. 2. 1201 Richmond and Danville R. Co., debenture bonds of $1,000 each, due in 1927, bearing interest at the rate of 6 per cent. per annum, cumulative.

No. 3. 288 Richmond and Danville consolidated mortgage gold bonds of $1,000 each, due in 1936, bearing interest at the rate of 5 per cent. per annum.

Script on above without interest, par value $240.

No. 4. 325 Richmond and West Point Terminal Railway and Warehouse Co. gold trust bonds of $1,000 each, due in 1897, bearing interest at the rate of 6 per cent per annum.

No. 5. Central Trust Co. of New York, certificate of deposit of first mortgage bonds of the Shenandoah Valley Railroad Co. under plan of reorganization, par value $18,000.

No. 6. 12 First Mortgage 7% Land Grant and Sinking Fund Gold Bonds of the New Orleans, Baton Rouge and Vicksburg Railroad Co., at $1,000 each, due in 1902.

STOCK OF INCORPORATED COMPANIES.

100 shares of the capital stock of the Bank of California, in the name of Jerome Lincoln.

271 shares of the capital stock of Colusa Co. Bank stock, in the name of A. C. Whitcomb. [89]

Three (3) shares of the capital stock of the Colusa and Lake Railroad Company, in the name of A. C. Whitcomb, of par value of $100 each.

2,000 shares of 110 each, of the Tumacacori Mining and Land Company (Limited), certificate in name of Charles P. Posbon, not endorsed.

10 shares of Gold Canon Consolidated Mining Company, in the name of Jerome Lincoln.

4,310 shares of Gold Canon Consolidated Mining Company, in the name of A. C. Whitcomb.

95 shares of the capital stock of the Rock Island Gold and Silver Mining Company.

50 shares of the capital stock of the Bella Union Gold and Silver Mining Company.

300 shares of the capital stock of the La Grange Ditch and Hydraulic Mining Company.

200 shares of the capital stock of Eugene L. Sullivan Mining Company.

100 shares of the capital stock of the Chase and Cornwall Silver Mining Company.

25 shares of the capital stock of the La Esperanza Mining Company.

53 shares of the capital stock of the "420" Mining Company.

15 shares of the capital stock of the Echo Gold and Silver Mining Company.

10 shares of the capital stock of the St. Francis Precious Metal Mining Company.

141 shares of the capital stock of the Union Gold and Silver Mining Company.

240 shares of the capital stock of the Techattucup Silver and Gold Mining Company.

501 shares of the capital stock of the San Francisco Dock and Wharf Company. [90]

56 shares of the capital stock of the Die Vernon Silver Mining Company.

272½ shares of the capital stock of the Echo Extension Gold and Silver Mining Company.

2000 shares of the capital stock of the South Feather Water and Union Mining Company, standing in name of Jerome Lincoln.

Sixty-six (66) coupons of California War Bonds, being coupons of twenty-two (22) bonds, and being coupons No. three (3) due on January 1st, 1855; coupons No. four (4) due January 1st, 1856, and coupons No. five (5) due January 1st, 1857, amounting in all to the sum of $2,519.87.

Three (3) city warrants of the City of San Francisco for $1,000 each, issued and made payable to Jesse L. Wetmore for grading Powell Street, and made payable for delinquent taxes under the act

of May 30th, 1861, two of said warrants bearing date April 20th, 1854, and one bearing date September 20th, 1854.

PROMISSORY NOTES.

Note of E. L. Sullivan to Jerome Lincoln, dated August 1st, 1876, for $8,485.90, bearing interest at one per cent. per month; renewed May 1st, 1880.

Note of H. Gibbons to A. C. Whitcomb, dated September 1st, 1882, for $500, payable
bearing interest at the rate of

Dated, April 11th, 1890.

J. V. COFFEY,
Judge. [91]

APPENDIX 2.

EXHIBIT TWO.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

No. 7871 Old Series
No. 50,794 New Series

FOURTEENTH ACCOUNT OF JAMES OTIS, TRUSTEE UNDER THE WILL OF A. C. WHITCOMB, DECEASED, FROM FEBRUARY 23, 1903, TO FEBRUARY 23, 1928.

February 23, 1903, to February 23, 1904.

	Income Received	$183,369.46
	Expenses paid	62,757.84
1904		
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account of Mrs. Louise Palmyre Vion Whitcomb	40,203.88
" "	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Countess Charlotte Andree Whitcomb Lepic	40,203.87

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1904		
February 23	To one-third of $120,611.62, balance Income Account from February 23, 1903, to February 23, 1904, credit account Adolphe Whitcomb	$ 40,203.87
February 23, 1904, to February 23, 1905.		
	Income received	179,026.37
	Expenses paid	47,475.41
1905		
February 21	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Mrs. Louise Palmyre Vion Whitcomb	43,850.32
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account Countess Charlotte Andree Whitcomb Lepic	43,850.32
" "	To one-third of $131,550.96, balance of Income Account from February 23, 1904, to February 23, 1905, credit account of Adolphe Whitcomb	43,850.32
February 23, 1905 to February 23, 1906.		
	Income received	187,543.97
	Expenses paid	48,882.87
1906		
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Adolphe Whitcomb	46,220.36

February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Mrs. Louise Palmyre Vion Whitcomb	$ 46,220.37
1906		
February 21	To one-third of $138,661.10, balance of Income Account from February 23, 1905, to February 23, 1906, credit account Countess Charlotte Andree Whitcomb Lepic	46,220.37
February 23, 1906, to February 23, 1907.		
	Income received	165,711.10
	Expenses paid	48,074.69
1907		
February 23	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Mrs. Louise Palmyre Vion Whitcomb	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Countess Charlotte Andree Whitcomb Lepic	39,212.14
" "	To one-third of $117,636.41, balance Income Account from February 23, 1906, to February 23, 1907, credit account Adolphe Whitcomb	39,212.13

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February 23, 1907, to February 23, 1908.			
	Income received		$164,123.33
	Expenses paid		45,537.60
1908			
February 23	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Mrs. Louise Palmyre Vion Whitcomb		39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Countess Charlotte Andree Whitcomb Lepic		39,528.58
" "	To one-third of $118,585.73, balance Income Account from February 23, 1907, to February 23, 1908, credit account Adolphe Whitcomb		39,528.57
February 23, 1908, to February 23, 1909.			
	Income received		183,129.13
	Expenses paid		49,157.53
1909			
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Mrs. Louise Palmyre Vion Whitcomb		44,657.20
" "	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Countess Charlotte Andree Whitcomb Lepic		44,657.20

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1909		
February 23	To one-third of $133,971.60, balance Income Account from February 23, 1908, to February 23, 1909, credit account Adolphe Whitcomb	$ 44,657.20
February 23, 1909 to February 23, 1910.		
	Income received	$196,960.44
	Expenses paid	51,334.30
1910		
February 23	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Mrs. Louise Palmyre Vion Whitcomb	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account Countess Charlotte Andree Whitcomb Lepic	48,542.05
" "	To one-third of $145,626.14, balance account Income Account from February 23, 1909, to February 23, 1910, credit account, Adolphe Whitcomb	48,542.04
February 23, 1910, to February 23, 1911.		
	Income Received	197,134.18
	Expenses paid	50,856.30
1911		
February 23	To one-third of $146,277.88, balance, account Income Account from February 23, 1910, to February 23, 1911,	

	credit account Mrs. Louise Palmyre Vion Whitcomb	48,759.30
		[96]
1911		
February 23	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Countess Charlotte Andree Whitcomb Lepic	$ 48,759.29
" "	To one-third of $146,277.88, balance account Income Account from February 23, 1910, to February 23, 1911, credit account Adolphe Whitcomb	48,759.29
February 23, 1911, to February 23, 1912.		
	Income received	183,291.02
	Expenses paid	45,560.72
1912		
February 23	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Mrs. Louise Palmyre Vion Whitcomb	45,910.10
" "	To one-third of $137,730.30, balance account Income Account February 23, 1911, to February 23, 1912, credit account Countess Charlotte Andree Whitcomb Lepic	45,910.10
" "	To one-third of $137,730.30, balance account Income Account from February 23, 1911, to February 23, 1912, credit account Adolphe Whitcomb	45,910.10
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February 23, 1912, to February 23, 1913.		
	Income received	$202,451.14
	Expenses paid	51,569.82
1913		
February 23	To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Mrs. Louise Palmyre Vion Whitcomb	50,293.78
" "	To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Countess Charlotte Andree Whitcomb Lepic	50,293.77
" "	To one-third of $150,881.32, balance account Income Account from February 23, 1912, to February 23, 1913, credit account Adolphe Whitcomb	50,293.77
February 23, 1913, to February 23, 1914.		
	Income received	211,432.07
	Expenses paid	52,032.63
1914		
February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Mrs. Louise Palmyre Vion Whitcomb	53,133.15
" "	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Countess Charlotte Andree Whitcomb Lepic	53,133.15

1914			
February 23	To one-third of $159,399.44, balance account Income Account from February 23, 1913, to February 23, 1914, credit account Adolphe Whitcomb	$	53,133.14
February 23, 1914, to February 23, 1915.			
	Income received		211,302.86
	Expenses paid		50,927.64
1915			
February 23	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Mrs. Louise Palmyre Vion Whitcomb		53,458.41
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Countess Charlotte Andree Whitcomb Lepic		53,458.41
" "	To one-third of $160,375.22, balance account Income Account from February 23, 1914, to February 23, 1915, credit account Adolphe Whitcomb		53,458.40
February 23, 1915, to February 23, 1916.			
	Income received		208,773.81
	Expenses paid		47,186.05
1916			
January 26	To amount credited "Undivided Income Account," as per account, being one-third of $120,338.28, balance account from February 23, 1915, to November 23, 1915		40,112.76

February 23	To amount credited "Undivided Income Account," one-third of $41,-249.48, [99] balance income for quarter ending February 23, 1916	$ 13,749.82
1916		
February 23	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Mrs. Louise Palmyre Vion Whitcomb	53,862.59
" "	To one-half of $107,725.18, balance account Income Account February 23, 1916, credit account Countess Charlotte Andree Whitcomb Lepic	53,862.59
February 23, 1916, to February 23, 1917.		
	Income received	149,239.38
	Expenses paid	42,944.74
1917		
February 23	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Mrs. Louise Palmyre Vion Whitcomb	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1916, to February 23, 1917, credit account Countess Charlotte Andree Whitcomb Lepic	35,431.55
" "	To one-third of $106,294.64, balance account Income Account from February 23, 1917, credit account Undivided Income Account	35,431.54

February 23, 1917, to February 23, 1918.

	Income received	119,585.75
	Expenses paid	24,274.83

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1918

February 23	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Mrs. Louise Palmyre Vion Whitcomb	$	31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account Countess Charlotte Andree Whitcomb Lepic		31,770.31
" "	To one-third of $95,310.92, balance account Income Account from February 23, 1917, to February 23, 1918, credit account J. Henry Meyer, Administrator Estate of Adolphe Whitcomb, deceased		31,770.30

February 23, 1918, to February 23, 1919.

	Income received	131,806.61
	Expenses paid	33,827.62

1919

February 23	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Mrs. Louise Palmyre Vion Whitcomb	32,659.66

February 23,	To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Countess Charlotte Andree Whitcomb Lepic	32,659.67
"	" To one-third of $97,978.99, balance Income Account from February 23, 1918, to February 23, 1919, credit account Estate of Adolphe Whitcomb, deceased	32,659.66

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February 23, 1919, to February 23, 1920.

	Income received	$152,693.72
	Expenses paid	43,661.63

1920

February 24	To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Mrs. Louise Palmyre Vion Whitcomb	36,344.03
"	" To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Countess Charlotte Andree Whitcomb Lepic	36,344.03
"	" To one-third of $109,032.09, balance Income Account from February 23, 1919, to February 23, 1920, credit account Estate of Adolphe Whitcomb, deceased	36,344.03

February 23, 1920, to February 23, 1921.		
	Income received	174,693.95
	Expenses paid	46,414.11
1921		
February 23	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Mrs. Louise Palmyre Vion Whitcomb	42,759.94
" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Countess Charlotte Andree Whitcomb Lepic	42,759.95
		[102]
" "	To one-third of $128,279.84, balance Income Account from February 23, 1920, to February 23, 1921, credit account Estate of Adolphe Whitcomb, deceased	$ 42,759.95
February 23, 1921, to February 23, 1922.		
	Income received	125,989.70
	Expenses paid	51,947.10
1922		
February 23	To balance account Mrs. Louise Palmyre Vion Whitcomb Income from February 23 to May 23, 1921	7,551.50
" "	To one-third of $42,437.15) To four-ninths of $31,605.45), balance income account from February	

	23, 1921, to February 23, 1922, credit account Countess Charlotte Andree Whitcomb Lepic	28,192.59
February 23	To one-third of $42,437.15) To four-ninths of $31,605.45), balance Income Account from February 23, 1921, to February 23, 1922, credit account Estate of Adolphe Whitcomb, deceased	28,192.58
" "	To balance account Income Account from November 23, 1921, to February 23, 1922, credit account Estate of Louise P. V. Whitcomb, deceased	1,751.81
" "	To balance Income Account, amount in hands of trustee for account Estate of Louise P. V. Whitcomb, deceased, or whom it may concern	8,354.12

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February 23, 1922, to February 23, 1923.		
	Income received	$145,509.32
	Expenses paid	70,550.28
1923		
February 23	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Countess Charlotte Andree Whitcomb Lepic	33,315.13
" "	To four-ninths of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit	

	account Estate of Adolphe Whitcomb, deceased	33,315.13
February 23	To one-ninth of $74,959.04, balance Income Account from February 23, 1922, to February 23, 1923, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	8,328.78
February 23,	1923, to February 23, 1924.	
	Income received	153,347.88
	Expenses paid	68,368.45
1924		
February 23	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Countess Charlotte Andree Whitcomb Lepic	37,768.63
" "	To four-ninths of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Adolphe Whitcomb, deceased	37,768.63

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1924		
February 23	To one-ninth of $84,979.43, balance Income Account from February 23, 1923, to February 23, 1924, credit account of Estate of Louise Palmyre Vion Whitcomb, deceased	$ 9,442.17

February 23, 1924, to February 23, 1925.		
	Income received	149,182.71
	Expenses paid	61,870.85
1925		
February 23	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Countess Charlotte Andree Whitcomb Lepic	38,805.26
" "	To four-ninths of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Adolphe Whitcomb, deceased	38,805.26
" "	To one-ninth of $87,311.86, balance Income Account from February 23, 1924, to February 23, 1925, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	9,701.34
February 23, 1925, to February 23, 1926.		
	Income received	146,399.92
	Expenses paid	65,295.55
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Countess Charlotte Andree [105] Whitcomb Lepic	$ 37,108.71
1926		
February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Adolphe Whitcomb, deceased	37,108.70

February 23	To balance Income Account from February 23, 1925, to February 23, 1926, credit account Estate of Louise Palmyre Vion Whitcomb, deceased	6,886.96
February 23, 1926, to February 23, 1927.		
	Income received	147,430.42
	Expenses paid	75,515.49
1927		
February 23	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Countess Charlotte Andree Whitcomb Lepic	35,957.46
" "	To balance Income Account from February 23, 1926, to February 23, 1927, credit account Estate of Adolphe Whitcomb, deceased	35,957.47
February 23, 1927, to February 23, 1928.		
	Income received	146,171.27
	Expenses paid	73,576.76
1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Countess Charlotte Andree Whitcomb Lepic	36,297.25

[106]

1928		
February 23	To balance Income Account from February 23, 1927, to February 23, 1928, credit account Estate of Adolphe Whitcomb, deceased	$ 36,297.26

Dated, August 28, 1928.

JAMES OTIS,
Trustee. [107]

State of California,
City and County of San Francisco.—ss.

James Otis, being duly sworn, deposes and says: I am the surviving trustee under and by the will of said A. C. Whitcomb, deceased. The foregoing account being filed as and for the fourteenth account of the trusteeship of the trust estate created by said will is in all respects just and true, and according to the best of my knowledge, information and belief, contains a full, true and particular account of all receipts and disbursements on account of said trust estate from the 23rd day of February, 1903, to the 23rd day of February, 1928, and of all sums of money belonging to said trust estate and of all property real and personal, which have come into the hands of the trustees or which have been received by any other person or persons by my order or authority, and I do not know of any error or omission in the said account to the prejudice of any person or persons interested in said trust estate.

JAMES OTIS.

Subscribed and sworn to before me this 28th day of August, 1928.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of San Francisco, State of California. [108]

APPENDIX 3.

EXHIBIT 3.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

PETITION FOR SETTLEMENT OF FOURTEENTH ACCOUNT OF TRUSTEE.

The petition of James Otis, as trustee under the will of A. C. Whitcomb, deceased, respectfully shows:

That he is the surviving trustee of the trust created by the will of the above named decedent.

That said will was admitted to probate in the above entitled Court and estate of said decedent distributed upon certain trusts in said will set forth, and that your petitioner is the surviving trustee of said trusts.

That at various times your petitioner and his predecessors, as such trustee, filed their accounts in said Court and that said accounts were settled by said Court. That the last account so filed and settled was the thirteenth annual account of your petitioner as such trustee covering the period from February 23, 1902, to February 23, 1903, and settled, allowed

and approved by the Hon. J. V. Coffee, April 7, 1903. That all of said proceedings were had and taken prior to the fire of April 18, 1906, and that all the records of said proceedings in the above entitled Court have been destroyed. [109]

That subsequent to said thirteenth annual account, your petitioner filed in the above entitled Court no accounts as such trustee, but such accounts were rendered annually in writing to the beneficiaries of said trusts and accepted by them.

That the account filed herewith as the fourteenth account of your petitioner shows the amount of the receipts and disbursements of your petitioner, as such trustee, during the twenty-five years commencing February 23, 1903, and ending February 23, 1928. That the details of said receipts and disbursements are set forth in said accounts annually rendered to the beneficiaries of said trust and in the books and records of your petitioner. That said details are voluminous and that it is not practical for your petitioner to present said details or file them in this Court, but that your petitioner offers to produce the same in Court upon the hearing of this petition, and prays that they be deemed to constitute a part of said account as so filed.

WHEREFORE, your petitioner prays that the account filed herewith may be settled, allowed and approved as filed.

PILLSBURY, MADISON & SUTRO,
Attorneys for Petitioner. [110]

APPENDIX 4.

EXHIBIT 4.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series
No. 50,794 New Series

In the Matter of the Estate of
A. C. WHITCOMB,
Deceased.

OBJECTIONS TO THE FOURTEENTH ACCOUNTS OF JAMES OTIS, TRUSTEE.

Napoleon Charles Louis Lepic and Charlotte de Rochechouart oppose the allowance and approval of the fourteenth account of James Otis, as trustee under the will of A. C. Whitcomb, deceased, filed in the above entitled matter, and by way of objection to said account respectfully show:

1. That opponents are beneficiaries of the trust under the will of said decedent and entitled, upon the termination of said trust, to take and receive, intact, from the trustee one quarter each of the trust estate.

2. That a great part of said trust estate is, and has been throughout the years 1913 to 1927, inclusive, invested in buildings and improvements subject to deterioration and depreciation and which have deteriorated and depreciated in value as follows:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
Carried forward	101,817.00 [111]
Brought forward	$101,817.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00
Total depreciation	$622,434.11;

that no reserves or other provision for such depreciation have been made by the trustee from the gross income of the trust estate; that said sum of $622,434.11 has been paid out by the trustee to the beneficiaries of said trust entitled to the income thereof, as income, thus impairing in a like amount the principal of the trust estate; and that said sum of $622,434.11 is included in the payments to income beneficiaries set up in said fourteenth account and for which the trustee takes credit therein.

3. That upon sales of bonds and real property of the trust estate losses have been sustained as follows:

In 1922	$ 4,812.50
1923	22,955.19
1925	1,875.58
Total losses	$29,643.27

reducing the capital in said amount; that the trustee has made no provision out of the gross income of the trust estate to make good such losses of capital; and that the whole of [112] said gross income has been paid out by the trustee, according to said fourteenth account.

WHEREFORE, opponents pray that the trustee be charged with $622,434.11 for depreciation and $29,643.27 for losses suffered by the principal of the trust estate.

W. H. LAWRENCE,
Attorney for Opponents.

State of California,
City and County of San Francisco.—ss.

W. H. Lawrence being duly sworn, says that he is the attorney of Napoleon Charles Louis Lepic and Charlotte de Rochechouart, the opponents who present the foregoing objections in the above entitled matter; that the said objections are true; that both of the said opponents are absent from the City and County of San Francisco, where deponent

resides and has his office, and for that reason deponent makes this verification.

W. H. LAWRENCE.

Signed and sworn to before me this 6th day of September, 1928.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California. [113]

APPENDIX 5.

EXHIBIT 5.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

No. 7871 Old Series.
No. 50,794 New Series.

ANSWER OF TRUSTEE TO OBJECTIONS TO FOURTEENTH ACCOUNT.

James Otis, as trustee under the will of A. C. Whitcomb, deceased, answering the objections of Napoleon Charles Louis Lepic and Charlotte de Rochechouart to his fourteenth account on file herein, admits, denies and alleges as follows:

I.

Admits the allegations in paragraph 1.

II.

Admits the allegations in paragraph 2, and in this behalf alleges that the disbursements made in said fourteenth account were made without deduction of reserves or other provision for the depreciation mentioned in said paragraph, under and pursuant to the advice of counsel learned in the law retained by said trustee, to the effect that under and

by virtue of the terms of said trust it was the duty of said trustee to make such disbursements without such deduction; that said trustee does not know now whether said advice was correct or not, and prays that this Court may decide upon the correctness of said claim [114] so advanced by objectors herein, for the future guidance of said trustee; that by reason of the fact that these payments have been made for many years without objection, in good faith and on the advice of counsel, it is neither fair, just nor equitable that said trustee be charged on account thereof, save and except to the extent that trustee may be able to reclaim from the recipients of said disbursements such amount as the Court may hold to have been erroneously paid to them.

III.

Admits the allegations of paragraph 3, and in this behalf alleges that since the creation of said trust, large gains and profits have been made through sales and other dealings in bonds and real property of the estate, and that said profits have been applied in increasing the capital of said trust estate; that such increases in the capital of said trust estate amount to a sum largely in excess of the amount stated in said paragraph, $29,643.27, and that if said sums mentioned in said paragraph are to be deducted from the income of the trust estate, then said other sums largely exceeding them are to be added to the amount distributable as in-

come of said trust estate, and the capital thereof reduced accordingly.

PILLSBURY, MADISON & SUTRO,
Attorneys for Trustee. [115]

State of California,
City and County of San Francisco.—ss.

James Otis, being first duly sworn, deposes and says: That he is the trustee named in the foregoing answer, that he has read said answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters, that he believes it to be true.

JAMES OTIS.

Subscribed and sworn to before me this 11th day of September, 1928.

[Seal] FRANK L. OWEN,
Notary Public, in and for the City and County of San Francisco, State of California. [116]

APPENDIX 6.

EXHIBIT 6.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon

Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, [117] as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, according to the rates of depreciation as prescribed and used by the Government of the United States in connection with federal income tax returns, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account

without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was [118] the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED and DECREED that the recipients of the income of said trust estate during the period from February 23, 1913, to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive, by making, executing and delivering to said Trustee their respective promissory notes, payable without

interest at the termination of said trust to the order of the remaindermen under said trust as they may be determined to be at the time of the termination of said trust.

It is further ORDERED, ADJUDGED and DECREED that from and after the year ending February 23, 1927, and until the termination of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper. [119]

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart, with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge. [120]

APPENDIX 7.

EXHIBIT 7.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 7871 Old Series.
No. 50,794 New Series.

In the Matter of the Estate of
A. C. WHITCOMB,

Deceased.

AMENDED ORDER AND DECREE SETTLING ACCOUNT.

James Otis, as Trustee under the will of A. C. Whitcomb, deceased, having on the 5th day of September, 1928, rendered for settlement his fourteenth account of his administration of said trust for the period from the 23rd day of February, 1903, to and including the 23rd day of February, 1928, and Napoleon Charles Louis Lepic and Charlotte de Rochechouart having on the 7th day of September, 1928, filed their objections in writing to the said account, and said account and said objections coming on regularly to be heard this 19th day of September, 1928, and Alfred Sutro, Esq., having appeared as counsel for James Otis, trustee under the will of A. C. Whitcomb, deceased, and W. H. Lawrence, Esq., having appeared as counsel for Napoleon Charles Louis Lepic and for Charlotte de Rochechouart, and Aylett R. Cotton, Esq., having appeared as counsel for John Freuler, as guardian

of the estate of Louise Adolphine France Emmanuelle Whitcomb, a nonresident minor, as guardian of the estate of Lydia Louise Ida Whitcomb, a nonresident minor, and as administrator of the Estate of Louise Palmyre Vion Whitcomb, deceased, and Clarence Shuey, Esq., having appeared as counsel for Countess Charlotte Andree Whitcomb Lepic and for [121] Marguerite Thuret Whitcomb, and Rufus Hatch Kimball, Esq., having appeared as counsel for Harvard College, and proof having been made to the satisfaction of the court that notice of the filing and hearing of said account has been given as required by law, and proof having been made and the court now finding that said account is in all respects full, true and correct, except as hereinafter stated:

It is hereby ORDERED, ADJUDGED and DECREED that the objection of said Napoleon Charles Louis Lepic and Charlotte de Rochechouart to said account that no reserve or other provision for annual depreciation for the years 1913 to 1927, both inclusive, as set forth in said objection, has been made, be, and the same is hereby, sustained; that the amount specified in said objections for each of said respective years from 1913 to 1927 is a proper amount to be allowed for depreciation, said amount for each of said respective years being as follows, to wit:

Year	Amount
1913	$23,751.00
1914	23,070.00

Year	Amount
1915	23,748.00
1916	31,248.00
1917	41,222.83
1918	55,302.96
1919	56,273.93
1920	55,585.23
1921	43,003.16
1922	39,408.00
1923	39,408.00
1924	39,258.00
1925	39,108.00
1926	55,833.00
1927	56,214.00

[122]

that James Otis, the said Trustee, made the disbursements as stated in his said fourteenth account without deduction of reserves or other provision for depreciation, under and pursuant to the advice of counsel learned in the law and retained by said Trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said Trustee to make such disbursements without such deduction; that said Trustee in making said disbursements without such deduction was entitled to rely upon the said advice of the said counsel, and that said disbursements were so made by said Trustee in good faith and without objection on the part of either the said Napoleon Charles Louis Lepic and/or the said Charlotte de Rochechouart, or any other person interested in said trust, and that no personal liability of any kind or nature should or

does attach to said Trustee or to said James Otis by reason of having made said disbursements, or any of them, without deductions.

It is further ORDERED, ADJUDGED AND DECREED that the recipients of the income of said trust estate during the period from February 23, 1913 to February 23, 1927, repay to the said Trustee the respective amounts received by them during the years 1913 to 1927, both inclusive, as set forth in the said objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart as the respective amount which should have been retained by said Trustee as a reserve for depreciation for each said years 1913 to 1927, both inclusive.

It is further ORDERED, ADJUDGED AND DECREED that from and after the year ending February 23, 1927, and until the termination [123] of said trust, the said Trustee withhold annually as a reserve for depreciation from the income from the trust property such an amount as may be proper according to the rules and regulations prescribed by the Government of the United States in connection with income tax returns, and if there be no such rules or regulations then such an amount as may be reasonable and proper.

It is further ORDERED, ADJUDGED and DECREED that the objection contained in the third paragraph of the objections of the said Napoleon Charles Louis Lepic and Charlotte de Rochechouart,

with reference to losses sustained on sales of bonds and real property, be, and the same is hereby, disallowed.

Done in open Court this 19th day of September, 1928.

FRANK H. DUNNE,
Judge [124]

APPENDIX 8.

EXHIBIT 8.

$305,867.06 San Francisco, California,
January 17, 1929.

For value received we, jointly and severally, promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of Three Hundred Five Thousand, Eight Hundred Sixty-Seven and 06/100 dollars ($305,867.06) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

CHARLOTTE ANDREE WHITCOMB LEPIC,
NAPOLEON CHARLES LOUIS LEPIC,
CHARLOTTE DE ROCHECHOUART,
By JOHN FREULER,
Their Attorney in Fact. [125]

APPENDIX 9.

EXHIBIT 9.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LOUISE A. F. E. WHITCOMB,
By JOHN FREULER,
Her Guardian. [126]

APPENDIX 10.

EXHIBIT 10.

$639,159.35 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust to pay the sum of Sixty-Nine Thousand, One Hundred Fifty-Nine and 35/100 Dollars ($69,159.35) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

MARIE MARGUERITE THURET WHITCOMB,
By JOHN FREULER,
Her Attorney in Fact. [127]

APPENDIX 11.

EXHIBIT 11.

$118,353.85 San Francisco, California,
January 17, 1929.

For value received I promise James Otis, trustee under the will of A. C. Whitcomb, deceased, at the termination of said trust, to pay the sum of One Hundred Eighteen Thousand, Three Hundred Fifty-Three and 85/100 Dollars ($118,353.85) in gold coin of the United States of America, without interest, to the order of the remaindermen under said trust as they may be determined to be at said termination.

LYDIA LOUISE IDA WHITCOMB,
By JOHN FREULER,
Her Guardian.

[Endorsed]: Filed April 12, 1932. [128]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals

for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board,
   (a) Petition, including annexed copy of deficiency letter.
   (b) Answer.

3. Findings of fact, opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Statement of the evidence as settled and allowed.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record. (Not included in Transcript.)

7. This praecipe.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 13th day of April, 1932.

[Seal] W. W. SPALDING,
Attorney for Respondent.

[Endorsed]: Filed April 14, 1932. [129]

[Title of Court and Cause.]

CLERK'S CERTIFICATE
TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 129, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 25th day of April, A. D. 1932.

[Seal] B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6835. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner vs. John Freuler, Administrator of the Estate of Louise P. V. Whitcomb, Respondent. Transcript of the Record. Upon Petition to Review the Decision of the United States Board of Tax Appeals.

Filed May 4, 1932.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6835

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Respondent.

BRIEF FOR RESPONDENT.

F. D. MADISON,
ALFRED SUTRO,
H. D. PILLSBURY,
FELIX T. SMITH,
V. K. BUTLER, JR.,
Standard Oil Building, San Francisco, California,
Attorneys for Respondent.

MASON, SPALDING & MCATEE,
Tower Building, Washington, D. C.,
PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Miscellaneous

No. 6835

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Respondent.

BRIEF FOR RESPONDENT.

1. PRELIMINARY STATEMENT.

This is a proceeding to review a decision of the Board of Tax Appeals. It involved the income tax for the fractional last year, 1921, of the life of respondent's decedent. The petitioner had asserted a deficiency (R. 7). Of this amount respondent contested $675.77* (R. 17). The Board sustained respondent's position (R. 54).

2. THE FACTS.

A. C. Whitcomb died in 1889 (R. 34), leaving a will† devising the residue of his estate in trust to pay his widow, the decedent, one-third of the interest or income

*Petitioner's inconsistent statement is erroneous (*infra* pp. 31-32).

†Petitioner's statements that the trust was created by *deed* must be inadvertent (*infra*, p. 27).

for life, with remainder over (R. 34-35). The residue consisted largely of cash, bonds, stocks and notes (R. 35). In 1906 the San Francisco fire destroyed the improvements on certain real estate held by the trust (R. 35-36). The trustee then adopted a policy of building very substantial improvements on the San Francisco real estate, acquiring additional real estate and converting the other assets of the trust to accomplish this end (R. 36). There were minor improvements in 1906, major improvements in the years 1910 to 1913, including the Whitcomb Hotel, and further improvements thereafter (R. 70). These improvements and the hotel furniture depreciated (R. 36). During the taxable fractional year 1921 one-third of this depreciation was $7,167.19 (R. 19), the total for the entire year being $43,003.16 (R. 36). During that fractional year, however, the trustee paid the decedent her share of the income without making any deduction for depreciation (R. 38). When respondent made an income tax return for this fractional year in the name of decedent, he showed merely the decedent's share of the net income after deducting the depreciation (R. 42).

The trustee filed his account with the probate court having jurisdiction of the will (R. 38). The remaindermen objected because of the absence of a depreciation reserve (R. 38-39). The court sustained the objection (R. 39-40) and ordered restoration of such a reserve (R. 41). Respondent repaid $10,700 (R. 42), which is more than the one-third share of the depreciation for the fractional year in question (*supra,* p. 2). The excess was due to the fact that the statement of account covered many years. The balance of the amount due from decedent and respondent was represented by part of the

notes of the beneficiaries, to whom the decedent's estate had been distributed.*

---

3. THE LAW.

The applicable law is found in the Revenue Act of 1921. Section 219 of this act applies to "the income of * * * any kind of property held in trust" (subsection (a)) and specifically to "income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals" (subdivision (4)). It requires the trustee to "include in the return a statement of the income of the estate or trust which, *pursuant to the instrument or order* governing the distribution, is *distributable* to each beneficiary, *whether or not distributed* before the close of the taxable year for which the return is made" (subsection (b)). It provides that on this income "the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the * * * trust for its taxable year which, *pursuant to the instrument or order* governing the distribution, is *distributable* to such beneficiary, *whether distributed or not*" (subsection (d)). The amount so taxable to the beneficiaries is allowed as a deduction on the trustee's income tax return (subsection (e)). Clearly enough, the only question that could be presented in this case is the determination of "that part of the income of the * * * trust for its taxable year which, *pursuant to the instrument* [the will of A. C. Whitcomb] *or order* [of the probate court] governing the distribution, is *distributable* to

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*Petitioner's contrary statement is a mistake (*infra*, p. 30).

such beneficiary [the decedent] *whether distributed or not''* for the fractional year ending with decedent's death.

This is so clear that it may be superfluous to cite the following expressions of the Board:

> "Since the Act provides that there shall be included in computing the beneficiary's net income that part of the income of the trust, which, '*pursuant to the instrument or order governing the distribution,* is distributable to such beneficiary,' and since the provision of the will under which the petitioner became beneficiary provided for the payment to her of all the profits and income arising from the properties held in trust, in quarter-yearly installments, there can be no question but that the entire income and profits of the estate, undiminished in any manner whatsoever, should have been included in computing the petitioner's net income for 1921. Merely because the amount in question was not paid or distributed or, as the petitioner contends, was not 'distributable' because of the overpayment in 1920 does not render it any the less income within the meaning of section 219, *supra,* and, therefore, taxable as such.''
>
> *Pyle v. Commissioner,* 16 B. T. A. 218, 222-223.

> "The fact that the petitioners have reported in their returns the amounts distributed to them by the trustees is not conclusive as to the amounts upon which they are to be taxed, since the controlling sections of the statutes (section 219 (a) (4) and (d) of the Revenue Act of 1921 and corresponding provisions of the Revenue Act of 1924) provide that the amount to be returned is that which, 'pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not.' ''
>
> *White v. Commissioner,* 25 B. T. A. 243, 249.

"A correct decision of the issues in this proceeding depends upon a proper construction of the provisions of the trust deed itself.

* * * * * * * * *

If the income was to be distributed currently by the fiduciary to the beneficiaries, then, under (b) (2) of section 219 of the Revenue Act of 1924, the fiduciary would be entitled to take as an additional deduction all of the income so to be distributed and there would be nothing left in the hands of the fiduciary to tax. And this would be true whether the income was actually distributed or not. * * * On the other hand, if the income for the taxable period now before us was not to be distributed currently to the beneficiaries, there is no additional deduction under (b) (2) of section 219 and the tax must be paid by the fiduciary."

McCrory v. Commissioner, 25 B. T. A. 994, 1007, 1008.

"The will of the decedent is the only evidence before the Board. From its terms we must determine whether the beneficiaries of the trust are entitled ratably to decrease their respective incomes by deducting therefrom certain amounts representing depreciation sustained by the depreciable assets included in the corpus of the trust. This identical question has heretofore been considered, exhaustively discussed, and decided by the Board. We have uniformly held that the terms of the trust instrument must determine whether trustees are authorized to set up a reserve for depreciation and to deduct ratable parts thereof each year from the income distributable to the beneficiaries."

Dixon v. Commissioner, 25 B. T. A. 1164, 1165.

"The only question in these proceedings is to determine the amount of income of the trust which is taxable to the beneficiaries. Its solution depends upon the rights of these beneficiaries under the will of Charles Netcher."

Newbury v. Commissioner, 26 B. T. A. 101, 106.

"It is obvious that the intention of the testator and not the acts, judgment or interpretations of the trustees must determine this issue."

Boston Safe Deposit and Trust Company v. Commissioner, 26 B. T. A. 486, 492.

"We hold, therefore, that this trust was one in which the income was to be distributed periodically and, under the provisions of section 219 (a) (4) of the Revenue Act of 1918 and subdivision (d) of the same section of the Revenue Act of 1921 its income, whether distributed or not, was taxable to its beneficiaries."

Yukon Alaska Trust v. Commissioner, 26 B. T. A. 635, 641-642.

We pass, therefore, to the question whether, as a matter of law, the depreciation was distributable under the will and the order of the superior court.

So far as the will is concerned, it is clear enough, on general authority, that the testator intended the decedent to get only her share of the "interest or income" and did not intend that the remainder interest should be depleted for her benefit. We have not here a specific bequest of a wasting asset. We have a general residuary devise. In fact, the assets covered by it "consisted largely of cash, bonds, stocks and notes" (R. 35, *supra,* p. 2). Such assets were not depreciable or wasting in their nature. The testator aptly spoke of the anticipated income

from them as "interest" (R. 35). In subsequent years the nature of the corpus of the trust property has changed. Today it is almost entirely improved realty and hotel furniture. The improvements and furniture are highly depreciable, naturally a wasting asset. Under such circumstances, when a trustee acquires wasting assets, it is well settled that the life tenant is not entitled to the whole rental or other income, but that an adequate reserve must be set up in order to take care of the depreciation and protect the interest in remainder.

An early New York decision on this point is *Matter of Housman,* 4 Dem. 404. In that case there was a testamentary trust of a residuary estate. The court said:

> "The other exception of the executors relates to the refusal of the referee to sanction the transference from income to capital of a sum equal to the amount of depreciation in the value of certain furniture held by them as part of the residuary trust estate. This furniture was in use by Mrs. Housman at the time of her death at her residence, No. 46 west twenty-fifth street, in this city.
>
> * * * * * * * * *
>
> "I think that the evidence supports the claim, made by the executors in schedule B, of the account here in controversy, that they have obtained, by letting the furniture with the house, $2,500 more rent than they could have obtained by letting the house unfurnished. Meantime, the furniture has, of course, been greatly depreciating in value, and, according to the testimony of Mr. De Waltearrs, is worth to-day only about one half what it was worth at the time of the appraisement on the former accounting. * * * if, out of income that the executors have from time to time retained to cover its depreciation, the amount of that

depreciation were to be turned over to the *corpus* of the estate, the *cestuis que trustent* for life would be found to have received larger revenues than they would have obtained from the rents of the house unfurnished, together with the income that could have been derived from the proceeds of the furniture itself. * * * it seems but just that the depreciation should be made good out of the enhanced rental arising from the use of the furniture; otherwise the beneficiaries for life get all the advantage of the course pursued by the executors, and those in remainder suffer all the loss.

* * * * * * * * *

"I can conceive of no situation which would more clearly call for the application of the doctrine respecting the apportionment of the interests of life tenants and remaindermen * * *. The doctrine is this: That where a testator has limited a gift of general residue in successive estates, the first taker is not to have the annual proceeds of such property as may be held by the executors *in specie*, but such property must be treated as if converted and capitalized, so as to allow the first taker the annual income that would be yielded by such capital, and to preserve the capital itself to meet subsequent claims under the settlement.

* * * * * * * * *

"The decree to be entered upon this accounting will simply contain a provision for the continued retention of the portion of the income already withheld, and for the retention, besides, of such reasonable sum out of future income as will suffice to make good the probable loss by depreciation in the value of the furniture" (pp. 409-414).

This, of course, is but a special case on the general problem which the courts have to meet in adjusting the

equities of life beneficiaries and remaindermen. The general principle has been stated:

> "*The existence of a corpus, principal, or fund is an essential element of the trust, and the preservation of this principal until the termination of the life estates is indispensable to the fullfilment of the testator's plans.* Therefore, *any depletion* of the principal tends to frustrate the fundamental purpose of the trust and should be avoided."
>
> *In re Gartenlaub*, 185 Cal. 648, 652.

This last case applied the principle in a very common situation, where a trustee has purchased bonds at a premium. The court, therefore, said:

> "Where the price paid for a bond consists of more than the par value thereof, that method of accounting should be adopted which will prevent the impairment of the principal unless the testator has clearly directed to the contrary. Otherwise the life tenant, who is entitled to receive only income, will, in effect, have received a part of the principal. In other words, where a premium is paid the ostensible interest yielded by the bond cannot be considered entirely as interest on the face value of the bond for a sum in excess of the face value has gone into the investment and the amount of interest remains unchanged, resulting, necessarily, in a decreased rate of return. A portion of the nominal interest is, therefore, a repayment of the premium" (p. 652).

The California law is in accord with the law of other jurisdictions.

> "The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But, apart from any speculative change in the market value, there is from lapse

of time an inherent and intrinsic change in the value of the security itself as it approaches maturity. It is this, and this only, with which the life tenant is to be charged. We therefore adhere to the rule, declared in the Baker case, that in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run; while, if the bonds are received from the estate of the testator, then the rule in the McLouth case prevails, and the whole interest should be treated as income. These rules may not work perfect justice in all cases, and we fully appreciate that there may be inconsistencies between them; but it is far better that they should be uniformly adhered to, even at the expense of a particular case, than that the administration of estates should be subjected to constant litigation and disputes. It is also to be said that, unless the rule in the Baker case is to be observed, the relative rights of life tenant and remainderman would largely depend on the favor or caprice of the trustee, who might either buy a bond bearing a high rate of interest at a great premium and impair the principal, or buy a bond bearing a lower rate of interest substantially at par and preserve the principal intact."

In re Stevens, 187 N. Y. 471; 80 N. E. 358, 359-360.

"Assuming that the purchase of bonds even at a premium, was safe, prudent, and such as judicious men would make in the conduct of their affairs, which is substantially the rule heretofore laid down, the question arises: Inasmuch as it is certain that the *corpus* of the fund is to be diminished if this investment is permanent, whether the trustee may retain

such sums annually as will restore to the fund at its maturity exactly what was taken therefrom at the time of the purchase? This is what the trustee has undertaken to do. If, as suggested in argument, there is any inaccuracy in the calculation by which this result is reached, this is a subordinate matter, to be determined by more accurate accounting should it be required, not necessary now to be discussed. That which is really income from a bond purchased at a price above par, say 120, and payable in 10 years, is not the amount received in interest annually, but that amount deducting therefrom the sum necessary to restore at the end of the 10 years the $20 premium. No prudent man would treat as income from his property the whole amount received when there was thus to be a diminution of his principal, amounting at the end of the 10 years to this premium, and steadily tending to this during the entire period. To deal with interest thus received as income purely, would, to the extent of the premium, exhaust the capital. The premium paid is no more than an advance from capital, which the remainder-man is entitled to have repaid if he is entitled to receive the capital intact. If, in such a case, the tenant for life should die before the maturity of the bond, and thus the whole advance not then be repaid, he would have paid no more than his just proportion. Unless the premium is to be restored, it is not easy to see how investments in bonds having a premium can be made in justice to the remainder-man, whose property (where a bond is kept to maturity) is diminished solely for the benefit of the tenant for life. Into the question how much income an investment, at a premium, in a bond, payable at a fixed future time, produces, the loss of the premium at that time necessarily enters as a factor.

* * * * * * * * *

"There can ordinarily be no better test of the income which a sum of money will produce, having regard to the rights of both the tenant for life and the remainder-man, than the interest which can be received from a bond which sells above par, and is payable at the termination of a fixed term, deducting from such interest as it becomes due such sums as will at maturity efface the premium. If such a bond has increased in value since its purchase, assuming it to have been an entirely safe investment, and none other should have been made, it has been because a change in the rates of interest, or some similar cause, has altered market values. There would be no reason to suppose that such a bond could be sold, and the amount received reinvested at any higher rate of interest, unless at the sacrifice of some safeguard in the investment. The investments of trust property should be made with a view to permanency, and not in any spirit of speculation; nor should changes be made except after much inquiry and circumspection, and ordinarily with an immediate and advantageous reinvestment in contemplation. In making such changes the trustees are not entitled so to exercise their authority as to vary or affect the relative rights of the *cestuis que trust.* Hill, Trusts, 483.

* * * * * * * * *

"The deduction from the full interest reserved to restore the premium at the end of the term was properly made."

New England Trust Company v. Eaton, 140 Mass. 532; 4 N. E. 69, 71-72, 74, 77.

"It is obvious that the amount advanced out of the capital of the fund for the payment of premiums should be made good, to prevent a loss when the securities mature. Payment of the whole annual in-

come to the beneficiaries for life would produce this loss, and diminish the principal, to the injury of the remainderman. This method of dealing with the fund operates most equitably between the life tenant and the remainderman, in that they mutually share the advantages and losses."

In re Allis' Estate, 123 Wis. 223, 101 N. W. 365, 368.

See, also:

Furniss v. Cruikshank, 230 N. Y. 495, 130 N. E. 625;
New York Life Insurance & Trust Co. v. Baker, 165 N. Y. 484, 59 N. E. 257;
Gould v. Gould, 213 N. Y. S. 286;
Kemp v. Macready, 150 N. Y. S. 618;
Dexter v. Watson, 106 N. Y. S. 80;
Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968;
Ballantine v. Young, 74 N. J. Eq. 572, 70 Atl. 668;
In re Wells' Estate, 156 Wis. 294, 144 N. W. 174.

Another common application of the principle is the amortization of leaseholds.

"Where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates which in progress of time will expire, or perish, or become of greatly diminished value, if the funds are held on a trust by which the income is to be paid for life to certain persons, and, on their decease, the remainder is given to other persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund, so as to preserve it unimpaired for those entitled in remainder."

Healey v. Toppan, 45 N. H. 243, 266-267.

"In the ordinary case where the assets of the estate consist of so-called wasting securities the general rule

is that executors or trustees should pay to the life tenant only so much of the income as represents a fair return upon the capital value, accumulating and retaining the residue for the benefit of the remaindermen. Frankel v. Farmers' Loan & Trust Co., 152 App. Div. 58, 136 N. Y. S. 703, affirmed 209 N. Y. 553, 103 N. E. 1124; Matter of Golding's Estate, 127 Misc. Rep. 821, 216 N. Y. S. 593. Only where it clearly appears from the will that the testator is not concerned as to whether or not there is anything left for the remainderman will the life beneficiary be entitled to receive the entire income of a 'wasting' security. Frankel v. Farmers' Loan & Trust Co., supra; Matter of Hall's Estate, 127 Misc. Rep. 238, 216 N. Y. S. 598; Matter of Schumann, N. Y. Law J. Dec. 14, 1926. In the cases just cited the life tenants were adjudged entitled to receive the whole of the net rents of the leaseholds involved because of the particular language of each will. In the Frankel and the Hall Cases there were provisions which permitted the invasion of the corpus of the estate for the benefit of the life beneficiary. In the Schumann Case the life tenant was entitled to the income of the principal until 1941, with power to invade the principal, at the end of which time the corpus of the trust vested absolutely in such beneficiary. *Here no such intention is manifest, nor is there in the will any other provision which takes this case out of the general rule governing 'wasting securities.'* On the contrary, the executors and trustees are charged with the duty, as shown by paragraph 'fifth,' 'to care for and preserve and invest' the residuary estate."

In re Hall's Estate, 224 N. Y. S. 376, 381.

See, also:

In re Murphy's Estate, 246 N. Y. S. 714;

In re Golding's Estate, 216 N. Y. S. 593.

A similar situation arose regarding royalties of a copyrighted book.

In re Elsner's Will, 206 N. Y. S. 765.

Somewhat similar also was a case concerning a limited toll bridge franchise.

Cairns v. Chaubert, 9 Paige's Chancery 160.

"Where there is a *specific* gift for life of things which are consumed in the using, the tenant for life must have the possession and the use, according to the gift. But if the gift of such articles, or of perishable articles, is *residuary* or *general,* the trustee must sell the articles and invest the proceeds, so that the tenant for life may receive the interest or income, and the principal sum may remain for the remainder-man. If the property consists of leaseholds, annuities, or other interests, which grow less valuable by lapse of time, they must be sold, and the proceeds invested in some permanent form, so that the interest can be paid to the tenant for life, and the remainder-man can receive a proper sum as principal. If the trustee does not convert such property within a reasonable time, the remainder-man can proceed against him as for a breach of trust. The tenant for life will be compelled to refund whatever he has received beyond his equitable proportion, and the trustees, in the event of the failure or inability of the tenant for life to refund, must make good the difference."

Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548.

"It has therefore been long established as a general rule, that where a testator makes a *general* gift of his estate, or the residue of his estate, generally to, or in trust for, a person for life with remainder over, so much of the property as consists of leaseholds, or

terminable annuities, or other interests of a perishable nature, must be converted and invested in permanent securities for the benefit of the remainderman. And the same rule applies to articles, which *ipso usu consumuntur,* such as wines, live stock, and other property of that nature. And if in contravention of this rule, the trustees suffer the tenant for life to receive the whole income arising from the perishable securities, he will be decreed to refund what he may have received over and above what he would have received, if the conversion had been duly made, and the proceeds invested in the three per cents.; and this difference will be treated as capital to be invested for the benefit of all parties entitled. The tenant for life is in the first place bound to make good this difference; * * *."

Hill on Trustees (Am. Ed.), 592-593.

"Bonds bought at a premium are ordinarily a wasting investment if the whole interest on the bonds is treated as income, because if the bonds are held until maturity the premium will be entirely lost, and even if they are not held until maturity, other things being equal, the premium will gradually grow smaller as maturity approaches. For this reason it is held by a majority of the jurisdictions that a trustee who has purchased bonds at a premium should deduct from the various collections of interest, and add to the principal, such sums as will replace the premium if the bonds are held until maturity. That is to say, he should establish a sort of sinking fund to repair the yearly waste of principal."

Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548a.

A distinction must be noted. Where a testamentary trustor has *specifically* devised or bequeathed a wasting

asset it might well be implied that he contemplated that the life beneficiaries should have all the profits without deducting depreciation.

In re Chapman, 66 N. Y. S. 235, at 238.

But, where wasting assets were included in a general residuary estate, without specific description, or were acquired later by the trustee from funds derived by him through the conversion of capital assets of the trust estate, the implication of such an intent would be improper.

Petitioner makes no argument to the contrary and cites no authorities opposed to the foregoing. However, the record does contain the dissenting opinion of Mr. Murdock on the Board of Tax Appeals (R. 49-53). This contains the broad statement:

> "The will made no specific provision for depreciation, and the general rule in such cases is that the life beneficiaries take all income undiminished by depreciation" (R. 49-50).

Various authorities are listed (R. 50). None of these authorities supports this statement of the "general rule." Because they are cited by Mr. Murdock, however, we discuss them in detail.

The first authority cited is *In re Hoyt,* 160 N. Y. 607, 55 N. E. 282. That case was based upon the special provisions of the will and is not to be taken as establishing the general rule. If it ever operated to establish the general rule it has certainly been definitely overruled.

A result contrary to the *Hoyt* case was reached in *New York Life Insurance & Trust Co. v. Baker,* 165 N. Y. 484, 59 N. E. 257, (*supra,* p. 13). The *Hoyt* case was

considered elaborately and was regarded as resting upon its special circumstances,

> "After a careful analysis of the facts outside of the will that the court deemed it wise to consider in ascertaining the intention of the testator, together with expressions therein *outside* of the fourth clause, by which the trust for the benefit of the daughter was created, * * *" (p. 258).

Again, in *In re Stevens,* 187 N. Y. 471, 80 N. E. 358 (*supra,* pp. 9-10), the *Hoyt* case was regarded as resting upon the peculiar circumstances that

> "a testator left as a trust fund for his daughter and only child a comparatively small share of a vast fortune and directed the income to be applied to her use 'in the most bounteous and liberal manner'" (p. 359).

In the *Stevens* case the court held that:

> "While we admit, in accordance with the decision in Matter of Hoyt, that the terms of the will may be such as to take a case without the general rule that the principal of the fund must be preserved intact, we think that to justify such an exception to the rule the intent should be expressed in the very clearest manner" (p. 359).

Of these decisions the appellate division has said:

> "The question as to when and under what circumstances trustees should set apart income to make good the shrinkage in capital value of securities purchased at a premium above par has been much discussed in this state, and cannot be said to have been put at rest until the decision of the Court of Appeals in Matter of Stevens, 187 N. Y. 471, 80 N. E. 358, 12 L. R. A. (N. S.) 814, 10 Ann. Cas. 511,

> which was handed down in February, 1907. Prior to that time it had been held, in Matter of Hoyt, 160 N. Y. 607, 55 N. E. 282, 48 L. R. A. 126, that the question as to how the loss, occasioned by the payment of premiums on investing the principal of a testamentary trust fund, should be borne as between the life tenant and remainderman was to be determined by ascertaining, when that could be done, the intention of the testator as expressed in the will creating the trust, *in view of the relation of the parties and surrounding circumstances.* As was justly remarked by Chief Judge Cullen in Matter of Stevens, supra, no trustee could know how to safely act under such a rule."
>
> *Kemp v. Macready,* 150 N. Y. S. 618, 619-620.

The court's surprise at this citation by Mr. Murdock of *In re Hoyt* will be increased when it notes that he had long been familiar with the *Baker, Stevens* and *Furniss* cases, and, indeed, had quoted with approval the statement in the latter case that

> "the Court of Appeals, by a decision in *Matter of Stevens,* 187 N. Y. 471, 80 N. E. 358, finally established the rule that, *in the absence of a clear direction in the will to the contrary,* trustees must amortize from the income of said bonds a fund sufficient to make good the encroachment upon the trust fund as the result of premiums paid for bonds."
>
> Quoted with italics by Mr. Murdock in *Simon v. Commissioner,* 10 B. T. A. 1186, 1188.

The second case relied upon by Mr. Murdock is *Devenney v. Devenney,* 74 Ohio St. 96, 77 N. E. 688 (R. 50). That case involved loss or gain through fluctuation in the market value of securities and had nothing to do with the question of depreciation of a naturally wasting asset.

The third case listed in the dissenting opinion, *Old Colony Trust Company v. Smith,* 266 Mass. 500, 165 N. E. 657 (R. 50), concerned the disposition of interest earned on funds of an estate during the period of administration. It had nothing to do with any question of depreciation.

The fourth case cited, *Blair v. Blair,* 82 Kan. 464, 108 Pac. 827 (R. 50), merely involved the question of the interpretation of a provision in the will allowing to the wife of the testator such income as she might "require." The court held that the word "require" meant what the wife reasonably might request from the trustee, rather than what the trustee determined to be her requirements. This is all that was decided in the case.

The fifth case cited is *Reed v. Longstreet,* 71 N. J. Eq. 37, 63 Atl. 500 (R. 50). The trustee there was *specifically* left a mortgaged farm and the question was whether or not the total income should be paid over to the life tenants or whether a reserve should be set up to pay off the mortgage so that the remaindermen would receive the property unencumbered. The court held that the life tenants, two daughters of the testator, were to receive the total income and that it would not be proper, under the facts presented, to set up a reserve. The court stressed the fact that the testator evidently desired to benefit his daughters, rather than their unborn children, who were the remaindermen, because the testator empowered the trustee to sell the mortgaged property and to hold the net proceeds of the sale upon the same trusts. The court said that such a sale would have produced the value of the equity of redemption and what was produced was to be held on the trusts, and that it could not

have been the testator's intent that the income of the proceeds, when invested, should be accumulated until this income, when added to the principal, should equal the entire value of the farm.

The sixth case cited, *Dooley v. Penland,* 156 Tenn. 284, 300 S. W. 9 (R. 50), involved only the interpretation of a will, the question being whether the wife was entitled to the entire income, or only to so much as was necessary for her support. The court held that the language was broad enough to entitle her to the entire income. There was no question of whether or not a reserve should be set up, or as to what constituted income "within the terms of the will."

Finally Mr. Murdock cites *Gay v. Focke,* 291 Fed. 721 (R. 50), a decision of this court. That was an appeal from the Supreme Court of the Territory of Hawaii. The question was as to the amortization of certain leaseholds under a specific will there involved. The territorial court had held that as to one leasehold specifically bequeathed the will was to be construed as not requiring amortization. This is in entire accord with the authorities we have mentioned (*supra,* pp. 16-17). As to the other lease, which passed merely by a residuary bequest, the territorial court had held that it was subject to amortization. This is also in accord with the authorities we have cited (*supra,* pp. 7-17). Only the remaindermen appealed. In accordance with what we have said, this court affirmed the decision that the lease specifically bequeathed was not subject to amortization. It pointed out expressly that it was not passing upon the question whether the other lease was subject to amortization. It is clear, therefore, that there is nothing in this decision in any way incon-

sistent with the general law as laid down in the cases we have cited or with the California law as expressed in the *Gartenlaub* case (*supra,* p. 9). That Hunt, Ct. J., in rendering the opinion of this court, did not understand that he was expressing any doubt about the general law, is apparent from the authorities which he cited. Thus he approved *Kinmonth v. Brigham,* 5 Allen Mass. 270. In that case the court said:

> "where the property is of a wasting nature, as terminable annuities, leases, or the like, the value of the whole investment at the testator's death should be ascertained, and what should be regarded as income be computed upon that basis" (p. 279).

Hunt, Ct. J., also approved *Lawrence v. Littlefield,* 215 N. Y. 561, 109 N. E. 611. There was a residuary devise of unproductive real property in trust to sell, and the question was as to the effect of the executors' delay in making the sale. The case is in no way inconsistent with the other New York cases (*supra,* pp. 9-10, 13-15). It, in turn, approves *Gibson v. Bott,* 7 Vesey 89, a case which involved the amortization of a leasehold. Lord Eldon there ordered:

> "that it being for the interest of all parties that they should not be sold, a value shall be set upon them; and the persons entitled for life shall have interest at four per cent. upon that value from the death of the testator" (p. 97).

Finally Hunt, Ct. J., cited *In re Hollebone* (1919), 2 Ch. Div. 93. In that case a testator had been entitled to certain installments payable for the purchase of his interest in a partnership of which he had formerly been a member. The court held these installments had to be apportioned between the life tenant and remaindermen.

We submit, therefore, that in its decision upon this Hawaiian law, this court certainly did not intend in any way to depart from the general law as laid down in the authorities we have cited, but that by citing decisions from Massachusetts and New York, where the rule is laid down so clearly, as stated above, this court placed itself in line with those courts.

The foregoing review of the authorities cited by Mr. Murdock, in his dissenting opinion below (R. 49-50) shows that none of them sustained a construction of the Whitcomb will which would permit the distribution of the depreciation.

Most significant, however, is the fact that Mr. Murdock has subsequently expressed his unqualified approval of the views we have outlined above. In the later case he said:

> "Where a trustee makes investments with the corpus of an estate, he is duty bound to see that, so far as reasonably may be, the corpus always includes the equivalent of the amount invested. If bonds belong to a testator and are worth more than par at his death, the trustee may not have to retain any of the interest. But courts have frequently held, for example, that a trustee who buys bonds at a premium, should retain the equivalent of the premium from interest and pay only the excess to the life tenants. *In re Stevens et al.,* 187 N. Y. 471; 80 N. E. 358; *New England Trust Company v. Eaton,* 140 Mass. 532; 4 N. E. 69; *In re Allis Estate,* 123 Wis. 223; 101 N. W. 365; *Curtis v. Osborn,* 79 Conn. 555; 65 Atl. 968; *In re Gartenlaub's Estate* (Cal.), 198 Pac. 209; *Kate M. Simon,* 10 B. T. A. 1186; *Ballantine v. Young,* 74 N. J. E. 572; 70 Atl. 668; affirmed 76 N. J. E. 613; 75 Atl. 1100. Might he accomplish a

contrary result by simply erecting a building with corpus or borrowed funds and paying all of the rents to life tenants? He could if he had authority from the grantor expressed in the instrument creating the trust. Here the will gave no such authority.

"This case is distinguishable from those where the exhausting property was originally a part of the trust estate. The building in question was not in existence when the testator died, but was built at some later date. The principal part of the cost was paid from borrowed funds. The balance came from the corpus of the estate. The building was erected on land in Block 58 of the original town of Chicago. The will gave the trustee authority to thus borrow and build. There is nothing in the will indicating that the testator intended the trustee should not deduct depreciation on any buildings she might erect. In the only provision of the will specifically referring to this property, the testator indicated a wish that the real estate in this Block 58 should be held together for the benefit of his entire estate and the beneficiaries thereunder. Had the trustee made no provision for replacing the building or paying off the mortgage from the income of the building, obviously the testator's wish could have been carried into effect only at the expense of other property constituting corpus of the estate in violation of the rights of remaindermen. * * * We think that they had no right under the will to have the annual income from the building distributed to them except as it exceeded an appropriate amount to restore the cost of the building at the end of its estimated life."

Newbury v. Commissioner, 26 B. T. A. 101, 106-107.

Applying the above to the specific facts of the case at bar, the Whitcomb will must be construed as not permitting the distribution of this depreciation.

See, also, the opinion of Mr. Murdock in
Simon v. Commissioner, 10 B. T. A. 1186.

The general law, therefore, undoubtedly is that in the absence of something very definite in the will or the surrounding circumstances, under a residuary devise in trust, if the trustee purchases depreciable assets he must maintain a reserve for depreciation. These principles of general law were applied in the "order governing the distribution," the order of the probate court which required the retention by the trustee of an adequate depreciation reserve (R. 39-41).

We submit, therefore, that the applicable law fixed the tax with reference to that which was distributable to the decedent "pursuant to the instrument or order governing the distribution" (Revenue Act 1921, *supra,* pp. 3-6) and that neither under the instrument (the will of A. C. Whitcomb) nor the order (of the superior court) was this depreciation distributable to the decedent. And that is the whole case.

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4. PETITIONER'S BRIEF.

A. NONE OF THE POINTS IN PETITIONER'S BRIEF WILL SUPPORT A REVERSAL.

It is remarkable that the real point in this case is not made one of the four points which petitioner discusses. The real point, as we have seen, is the law regarding the construction of a general devise to a trustee for life tenant and remainder, so far as concerns the depreciation of wasting assets subsequently acquired. This point petitioner's brief entirely ignores. Petitioner's four points are:

"I. The distribution of the income to life beneficiaries, including respondent's decedent, was controlled in fact and in law by the terms of the deed of trust* executed in 1889.

II. The record discloses that there was no actual change in possession of all or a substantial portion of the income in question and no *bona fide* intention to restore the same to the trustee.

III. The question presented is one of general law arising under a Federal revenue statute as to which the Federal Courts are free to exercise their independent judgment.

IV. Even if it be conceded for the purpose of argument that local law should control, nevertheless the orders of the State court could not under the circumstances of this case retroactively change the taxable status of distributions already made" (Pet. Br. p. 1).

Making the correction, substituting the word "will" for "deed of trust," petitioner's first point is, indeed, the first branch of our argument as shown above. The distribution of the income to life beneficiaries, including respondent's decedent, was, we submit, controlled in fact and law by the will of A. C. Whitcomb, and by that will, construed in the light of the authorities we have reviewed above, it is clear that the depreciation was not distributable to the defendant.

Petitioner's second point seems to us utterly immaterial. The law, as we have said, taxes to the beneficiary "that part of the income which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, *whether distributed or not*" (*supra,*

*By which petitioner must mean "will" (*infra,* p. 27).

pp. 3-6). "Actual change in possession of all or a substantial portion of the income in question" is not made a criterion of taxation under this law and the question of a particular individual's intention, whatever it may have been, is immaterial.

Petitioner's third point may well be granted. The authorities upon which we have relied in our construction of this will (*supra,* pp. 7-17) are not local authorities, but express the general law of the United States.

The same is to be said of petitioner's fourth point. It is not our position and has not been the position of the Board that the order of the state court "could * * * retroactively change the taxable status." The true point of the case is that under the law the depreciation was at no time distributable. The order simply recognized that and settled the trustee's accounts accordingly.

B. THERE ARE ERRORS OF FACT IN PETITIONER'S BRIEF.

In the opening statement of facts, petitioner recognizes that this is a testamentary trust (Pet. Br. p. 5). Subsequently, however, he regards the trust as one created by a deed *inter vivos* (Pet. Br. pp. 11, 12, 13, 16, 20, 31, 32). Of this "deed of trust" petitioner says:

> "There was no provision for a depreciation reserve" (Pet. Br. p. 16),

ignoring the provision which the law implies from a devise of this kind and subsequent investments in wasting assets made under it (*supra,* pp. 7-17).

Petitioner repeats the statement that the distribution of the depreciation was made "pursuant to the terms of the

instrument'' (Pet. Br. pp. 16-17, 20), thus seeming to assume that the instrument expressly required the distribution of the depreciation, and overlooking the true lawful construction of the will, which required the withholding of the depreciation (*supra,* pp. 7-17), a construction which the order of the state court confirmed (*supra,* p. 25).

Petitioner insists that:

> ''For nearly forty years the life beneficiaries under a deed of trust created in 1889 received and enjoyed the full income therefrom undiminished by any amounts on account of depreciation reserve'' (Pet. Br. pp. 11, 17, 20, 32).

For twenty-seven years from the time of A. C. Whitcomb's death in 1889 until 1906, when the fire resulted in a change in the investment policy of the trustee, no material part of the corpus of the trust estate was depreciable or a wasting asset of any other kind. The question of depreciation, therefore, did not arise. From 1906 until 1913 the trustee was engaged in various stages of the construction of the Whitcomb Hotel. Any attempt to base an argument, therefore, upon anything done by the parties to this trust in the treatment of depreciation prior to 1913 must fail. There was not and could not have been any question of depreciation before 1913.

Petitioner attacks the proceedings in the state court, characterizing them as a ''friendly settlement'' (Pet. Br. pp. 2, 11, 21, 32), ''a 'contest' in name only'' (Pet. Br. p. 21), laying emphasis upon ''the rapidity with which the proceeding moved'' (Pet. Br. pp. 15, 22), describing the notes finally given as ''peculiar'' (Pet. Br. pp. 22, 16). All

this is a mere attempt to create an atmosphere. Either this proceeding was void for collusion or it was not. Petitioner does not dare to charge collusion and explicitly disclaims any such intention (Pet. Br. pp. 22, 32). The Board of Tax Appeals made no such finding, but did make findings about the regularity of the proceedings and the fact that all parties were represented at the hearing (R. 38-39). The furthest that the Board went was the mere suggestion in the opinion that "the proceeding before the Superior Court *may* have been a friendly one" (R. 45).

In his attempt to discredit the state court proceedings, petitioner lays stress upon "the fact that the objections were restricted to those years in which income taxes were a factor" (Pet. Br. p. 22), overlooking the fact that since there was no depreciation question prior to 1913 (*supra,* p. 28), there could have been no objection on that score.

In a further attempt to discredit the state court, petitioner says that that court "adopted in its orders the amounts claimed by the remaindermen to have been improperly distributed" (Pet. Br. p. 22). This is a manifest error. Paragraph 2 of the objections (R. 129-130) related to the matter of depreciation. Paragraph 3 of the objections (R. 131) related to losses in dealings with securities. The state court did allow the objections in paragraph 2 which related to depreciation (R. 136-139). It expressly disallowed the objections regarding losses in dealings in securities (R. 139). If a collusive decree had been possible, it could as well have covered both sets of objections as only one. The fact is, however, that both sets of objections were considered and submitted fairly to

the court for such ruling as the court might make. The court allowed one set of objections and disallowed the other, because on the authorities (*supra,* pp. 7-17) there was nothing else to do about the former, and because the latter seemed at least doubtful.

Finally petitioner repeatedly ascribes to respondent the repayment of only $10,700 (Pet. Br. pp. 10, 16, 20, 23, 37), "scarcely more than nominal compliance" (Pet. Br. p. 11). He computes this amount as only 7% of the amount of depreciation distributed to respondent and the decedent, and says:

> "No notes or other obligations evidence even a simulated intention to repay the remaining 93 per cent" (Pet. Br. p. 23).

Nothing could be further from the fact. The truth is that all of the distributions of depreciation have been repaid. The Board fixed the total amount of depreciation at $622,434.11 (R. 39). The repayments were:

Appendix 8,	$305,867.06 (R. 145);
Appendix 9,	$118,353.85 (R. 146);
Appendix 10,	$ 69,159.35 (R. 147);
Appendix 11,	$118,353.85 (R. 148);
Respondent's payment	$ 10,700.00 (R. 42);
Total	$622,434.11

Of the amount paid by respondent, which actually exceeded decedent's share of the depreciation for the fractional year in question (*supra,* p. 2), petitioner says repeatedly:

> "The record does not disclose on what account or with respect to what year or years this payment was made" (Pet. Br. pp. 16, 23, 37).

He makes two conflicting contentions about this, "Logically it would seem reasonable to apply it against the earlier years first" (Pet. Br. p. 23), and "for reducing the income of the year of payment rather than for making a retroactive change" (Pet. Br. p. 37). He overlooks the fact that the presumption as to the correctness of the Board's decision must require the assumption that the Board allocated this payment to the year here under attack, if, indeed, such an assumption were necessary to sustain the Board's decision. As we have said, the cash payment was more than sufficient to meet the whole amount of the depreciation for this fractional year (*supra,* p. 2).

We are at a loss in any attempt to ascertain what bearing petitioner claims these last matters can have upon the present appeal. Petitioner himself says:

> "We deem the matter of compliance or noncompliance with the orders of the probate court immaterial to a proper disposition of this appeal" (Pet. Br. p. 23).

Finally we find petitioner in error even as to the amount involved in this appeal. He states it definitely as $723.60 (Pet. Br. p. 1). His reference (R. 9) is to the statement annexed to the 60-day letter. This letter, indeed, did propose a deficiency of $723.60 (R. 7). While the original petition to the Board contested this whole amount (R. 5), an amended petition reduced the amount in controversy to $675.77 (R. 17). The Board actually

fixed a deficiency of $95.61 (R. 54). This can only leave $627.99 now in controversy.

C. PETITIONER'S BRIEF IS BASED UPON VARIOUS OVERSIGHTS REGARDING THE APPLICABLE LAW.

It is by no means clear whether petitioner thinks this appeal is governed by the Revenue Act of 1921 (Pet. Br. pp. 2, 3, 11, 17-18) or by the 1924 and 1926 acts (Pet. Br. pp. 3-4, 11, 18-19). Surely only the 1921 act can affect this case, which is concerned with income for a fractional portion of that year. Perhaps the repeated references to the later laws in petitioner's brief are on the theory, which he expresses, that the latter are simply "clarifying provisions in new legislation * * * recognized as declaratory of existing law" (Pet. Br. p. 19). We fail to find anything in the acts of 1924 and 1926 which particularly clarifies the one issue in this case, that is, whether it is proper to tax respondent on account of the depreciation of the trust estate during the fractional year in question, which depreciation, "pursuant to the instrument (the will of A. C. Whitcomb) or order (of the Superior Court) governing the distribution" was *not* distributable to the decedent "whether distributed or not." If, however, any clarifying effect is to be given to any subsequent legislation, we respectfully call attention to subdivision (k) of Section 23 of the Revenue Act of 1928 relating to the depreciation deduction, which expressly provides:

> "In the case of property held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument cre-

ating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each."

Under this law it is clear that even in the situation opposed to that of respondent here, where under a trust the amount distributable to the life beneficiary is the net income, plus the depreciation, so that the life beneficiary really gets periodical payments out of the corpus of the trust, to the detriment of the remaindermen, nevertheless such life tenant may deduct the amount of the depreciation so as to be taxable only upon the real income which he receives out of the net income of the trust estate. This amounts to a legislative repeal of the principles laid down in the earlier *Whitcomb* cases, *Appeal of Whitcomb,* 4 B. T. A. 80; *Appeal of Whitcomb,* 5 B. T. A. 191; *Whitcomb v. Blair,* 25 F. (2d) 528 (Pet. Br. pp. 14, 20), and the similar decisions upon which petitioner's whole argument is based (Pet. Br. p. 20, note 2). This legislation, therefore, naturally destroys the basis for petitioner's claim here. It has been suggested that it is only declaratory of the existing law. Hand, Ct. J., in *Merle-Smith v. Commissioner,* 42 F. (2d) 837, 842.

We cannot express too strongly, however, our conviction that this legislation was not necessary for our case and that our case is essentially distinguishable from all those upon which petitioner relies. This indeed petitioner impliedly concedes, if contrary to his contentions it should be held that the state law governs (see his point III, Pet. Br. p. 24), or that the decision of the Superior Court controls (see his point IV, Pet. Br. p. 32).

The essential distinction between the case now before this court and the various cases relied upon by petitioner

is in the fact that, as pointed out above, in our case it is clear, and the state court has held, that the depreciation was not distributable to respondent's decedent. In all of the cases relied upon by petitioner the contrary was the fact, or was assumed to be the fact. For instance, in *Appeal of Whitcomb,* 4 B. T. A. 80, the determination proceeded on the ground that the total amount, net income plus depreciation, was the share of the net income of the trust to which she was entitled (p. 82). The Board indeed assumed that the depreciation deductions did not affect the computation of distributable income of the life beneficiaries (p. 84). *Appeal of Whitcomb,* 5 B. T. A. 191, was a similar case. The latter case was reviewed in *Whitcomb v. Blair,* 25 F. (2d) 528. Without considering the authorities, without any argument or discussion, the court simply assumed that the life tenants were entitled to receive the full income, without regard to exhaustion. These gratuitous assumptions alone distinguish these cases from the case at bar. The distinction is not one of federal law or of income tax law, but simply a matter of the correct construction of the will and the rights of the parties under it as a matter of general law.

Much of petitioner's brief is devoted to the question "whether the situation calls for the application of state or federal law" (Pet. Br. pp. 24-33). The materiality of this discussion is clouded somewhat by petitioner's positive assertion that "There is no necessity to consider the question" (Pet. Br. p. 20), and also by the astounding fact that *petitioner makes no effort whatever to establish either what the state or the federal law is on the point in question* (*supra,* p. 25).

Petitioner's discussion of this point is based chiefly upon *Swift v. Tyson,* 16 Pet. 1 (Pet. Br. pp. 24-26). This applies, of course, to questions of "general commercial law, where the state tribunals are called upon to perform the like functions as ourselves" (Pet. Br. pp. 25, 12, 24). Petitioner loses sight of the fact that we have not here a mere question of general commercial law. We are considering the application of a federal taxing statute truly enough, but the application of that statute to the rights and obligations of parties in a *testamentary* trust of *real property,* questions excluded from the application of the doctrine of *Swift v. Tyson* by the very cases upon which petitioner relies. Thus *Swift v. Tyson* itself excludes "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial" (Pet. Br. p. 25). See, also, the other cases he cites.

> "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. *This is especially true with regard to the law of real estate* * * *. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is" (*Burgess v. Seligman,* 107 U. S. 20; Pet. Br. p. 28).

> "The courts of the United States adopt and follow the decisions of the highest court of a State * * * in reference to the common law of the State, and its laws and customs of a local character" (*Bucher v. Cheshire Railroad Co.,* 125 U. S. 555; Pet. Br. p. 29).

In applying federal revenue laws, and especially in applying federal income tax laws, the courts have been at pains to ascertain just what the local law was which created the property rights to which the federal law had to be applied. See, for instance, the painstaking analysis of state decisions in the various community property income tax cases.

Poe v. Seaborn, 282 U. S. 101;
Goodell v. Koch, 282 U. S. 118;
Hopkins v. Bacon, 282 U. S. 122.

A similar attitude was adopted by the court in determining the effect of an oil lease under the state laws.

Group No. 1 Oil Corporation v. Bass, 283 U. S. 279.

Petitioner draws a fine distinction regarding the application of the relative Section 219 of the Revenue Act of 1921. He speaks of "two types of distributions to beneficiaries, one of current income distributed under the terms of a self-executing deed of trust,* as in the present case, and the other where distribution is made by a guardian under court orders" (Pet. Br. p. 11). The matter is amplified (Pet. Br. pp. 17-19). Our best understanding of this demonstration is that petitioner means that since subdivision (4) of subsection (a) of Section 219, although it does not use the word "order," does speak of a guardian holding or distributing income as a court may direct, and does also speak of "income which is to be distributed to the beneficiaries periodically,"

> "From this it follows that the 'order' referred to in subsections (b), (d), and (e) is the order spoken of in subsection (a) (4)" (Pet. Br. p. 18).

*will?

This despite the fact that there is no order spoken of in subsection (a) (4). From this basis petitioner argues that,

> "Since that 'order' relates exclusively to guardians, it follows that Congress intended the trust instrument to control in the case of trusts and the court order in the case of guardians" (Pet. Br. p. 18).

All this can have no other end than to exclude entirely from the consideration of this court the order of the state court which settled the trustee's account and determined that the depreciation was not distributable to respondent's decedent. We submit that no such strained construction can be given to the statute. Subdivision (4) of subsection (a) does not use the word "order." The only reason why subdivision (4) of subsection (a) groups the two kinds of income which it does is that, in contradistinction to the income mentioned in subdivisions (1), (2) and (3), the legal title to which in each case remains in the trustee until the end of the taxable year, the legal title of the income treated in subdivision (4) does not remain in the trustee. As soon as the *distributable* income becomes distributable, whether by virtue of a trust instrument or a court order, it is regarded for income tax purposes as passing to the petitioner. Since a guardian is a mere curator and at no time has legal title, *all* of the income received by a guardian vests immediately in the ward. For these reasons subsection (d) provides that the two classes of income discussed under subdivision (4) of subsection (a) are not taxable to the fiduciary, but to the beneficiary. Subsection (b) makes provision for returns accordingly. There is nothing in

any of this which requires that the word "order," as used in these later subsections, or in any other portion of the act, be restricted to orders directed to guardians because of anything in subdivision (4) of subsection (a) which, as we have said, does not use the word "order."

Petitioner's brief is written in entire disregard of the peculiar provisions of the California statutes in regard to probate procedure and testamentary trusts. We realize that in many jurisdictions an executor appointed by a will proceeds to act under the will in that capacity. Such is by no means the law of California; the estate is subject to the control of the Superior Court for the purpose of administration (Probate Code, Section 300*); the executor named in the will has no power until he qualifies (Probate Code, Section 400); the Probate Court directs the issuance of letters to the executors named (Probate Code, Section 407). We realize, also, that in many, perhaps most, jurisdictions, the executor proceeds to make distribution when the estate is ready for it without any special court proceeding. That is certainly not the law of California; elaborate procedure is devised by which orders may be obtained for partial distribution, ratable distribution and final distribution (Probate Code, Sections 1000 to 1025); in the case of a testamentary trust, the executor delivers the property to the trustee under such a decree of distribution. There was such a decree in the instant case (R. 79-109). This decree, even if erroneous, was final (*Crew v. Pratt,* 119 Cal. 139, 147-152). It controls the rights of the parties under the trust. We realize, also, that in most jurisdictions a testamentary

*The Probate Code is cited. Its provisions, however, are substantially those of the earlier laws which it codified.

trustee, like any other trustee, proceeds to act on his own responsibility; if he requires directions of any court on any point under the will, his application is to a court of equity. This is not the California system.

> "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction" (Probate Code, Section 1120).

This section contains elaborate provisions for an accounting by the trustee, just as was done in the instant case (R. 110-128). We submit that such a trustee acts constantly under the direction of the court. Whatever he does is tentative until his accounts are settled. In California, therefore, we have an instance of "the juridical conception that a testamentary trusteeship * * * is due to the court authenticating the will * * * that offices conferred by wills are really due to the approval of administrative courts authenticating the will" (*In Re Ripley,* 167 N. Y. S. 162, 166). This, says Surrogate Fowler, "is wholly modern and is a part of the philosophical apparatus of the modern bureaucratic state. It is now generally recognized that all modern states tend to this form, and the courts tend to follow." He deplores this as in conflict with "fundamental traditions" but concedes there is evidence that it has gained ground. To such a trustee we find those provisions of the Revenue Act of 1921 peculiarly applicable where they speak of an "order governing the distribution of income" (subsection (b), subsection (d), subsection (e)).

It is clear that this is just the kind of case to which the draftsmen of the Revenue Act of 1921 intended these provisions to apply. It is even more clear that these

draftsmen could not have intended these provisions to apply to any order relating to a guardian. Subdivision (4) of subsection (a), upon which petitioner relies in his attempt to apply the provisions of these later subsections to orders regarding guardians, relates to two subjects. The first is a trust under which income is distributed to beneficiaries periodically. The second is to a guardianship. As to the first of these subjects, the law taxes the income distributable (because, as we have said, it is that income which belongs to the beneficiaries). As to the second, the law taxes *all the income distributable or undistributable* (because it all belongs to the ward). It would have been idle in the later subsections to make any provision regarding the distributability of the income of a minor because, as we have said, subdivision (4) of subsection (a) taxes all of the minor's income, whether it is "to be *held or distributed.*" Therefore, petitioner's attempt to construe the provisions of these later subsections regarding distributability so as to confine or even relate them to the income of a minor held by his guardian is simply an attempt to give these later subsections an absurd construction. We submit that the matter of distributability is a criterion of the taxability of income only in cases like the instant case in which the trust requires the periodical distribution of income, and very definitely not in the case of income received by the guardian of a minor. The provisions of the latter subsections, therefore, applying this criterion, must refer, not to guardianships, but to cases of this kind and the words "instrument or order governing the distribution" in these sections must relate to an instrument such as the will of A. C. Whitcomb here, and the orders of the probate court shown in this record.

Two cases are mentioned by petitioner in his attack upon the order of the superior court settling the trustee's accounts in this case.

The first case cited is *Fidelity & Columbia Trust Co. v. Lucas,* 52 F. (2d) 298 (Pet. Br. pp. 32-35). In some respects, and from a general standpoint, this case illustrates a situation precisely the converse of that in the case at bar. The government was contending that under the Ewald will certain income was to be accumulated in the hands of the trustee and returned by him as income of the trust estate. The beneficiaries, however, contended that this income should have been distributed to them and returned as their income. On one point the decision is an important and strong one favoring our position. After stating the question the court expressly held that it would disregard what actually was done with the money.

> "Therefore, we may disregard the manner in which the trustee handled this yearly surplus income. The vital question is: How did L. P. Ewald by his will intend it to be handled? This intention must be gathered from the will itself" (p. 301).

That is, the case was decided by the district court there on the basis prescribed by Section 219 of the Revenue Act of 1921, the amount "which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, *whether or not distributed,*" just as we contend the case should be decided here. On this basis, as we have said, there can be no question as to the correctness of our position (*supra,* pp. 3-6). Petitioner, of course, cites that case, not for the part of the decision mentioned above, nor, indeed, for the ultimate decision on the merits that the amounts in question were not dis-

tributable to the beneficiaries, but because, in reaching that conclusion, the district court disregarded a contrary construction of the will by the state circuit court. We are not familiar with the Kentucky practice and are not in a position to say whether or not the district court was right in this case in disregarding the state court's decision. All that can be said is that if the district court was right in that case, then the Kentucky practice is very different from the situation in California (*supra,* pp. 38-40). The same case was again before the district court (*Fidelity & Columbia Trust Company v. Lucas,* 1932 C. C. H., Vol. III, par. 9167). That decision emphasizes the correctness of the remarks we have made. On the phase of the case in which we maintain that the district court is taking a strong position in support of our contentions here, the district judge said the second time:

> "Certainly what the trustee did under the will is not binding upon this court."

The court's view of the proceedings in the state circuit court was further elaborated.

> "The petitions for advice and the orders of the court entered therein were dealing largely with administrative matters in the handling of the Ewald estate. There was no real issue made on the construction of the will in the State Court proceedings, and while the question may have been suggested by the record, the orders made by the state Court can not be accepted by this court as a deliberate judicial construction of the will."

In the case at bar the pleadings in the state court made a very definite issue on this question of construction (R. 129-135). The Board found that all parties were repre-

sented at the hearing (R. 39). The decision certainly passed definitely upon the contentions of the parties sustaining one objection and overruling another (R. 39-41). We submit, therefore, that the decisions under the Ewald will are in our favor and certainly not authority against our contentions here.

The other case relied upon by petitioner is *Ford v. Commissioner,* 51 F. (2d) 206 (Pet. Br. pp. 35-37). This is an outgrowth of litigation in which varying results were reached by the courts and the Board.

Ford v. Nauts, 25 F. (2d) 1015;
Appeal of Ford, 19 B. T. A. 1143;
Ford v. Commissioner, 51 F. (2d) 206.

In that case decedent left an estate of about $6,000,000, against which there seem to have been some debts. In December, 1920, six months after the death, the executors, without any authority from the Ohio court, actually made a distribution to the heirs of about $4,000,000 worth of securities. At that time the debts were still unpaid. The heirs received income on these securities and returned the income for taxation. In 1926 the probate court ordered that this distribution was void and directed the return of the securities distributed, with leave to make a redistribution "as of December 31, 1922." The beneficiaries, having paid their 1921 income tax upon this income, filed a refund claim and later brought suit to get it back. The district court (*Ford v. Nauts,* 25 F. (2d) 1015) held the original distribution unlawful under the Ohio law because of the existence of debts at that time. Accordingly, the district court held that the income received by the heirs individually really was income of the estate and, therefore, not properly taxable to the heirs individually.

The 1922 taxes were not paid by the heirs but were the subject of the proceeding before the Board (*Appeal of Ford,* 19 B. T. A. 1143). Additional facts were brought out. Apparently the $2,000,000 left in the estate after the distribution of 1920 was sufficient to pay the debts, because before the restoration order in 1926 the executors in 1925 filed in the probate court a statement showing that all debts had been paid. The Board of Tax Appeals relied largely upon the fact that the court's order really did not annul the distribution of 1920, but simply postponed it until 1922.

The Board's decision was reviewed in *Ford v. Commissioner,* 51 F. (2d) 206, which is the decision cited by petitioner (Pet. Br. pp. 36-37). The court pointed out that under the Ohio law the 1920 distribution "was premature," that by the 1926 order distribution was postponed until 1922. Regarding the status of the heirs, during the year 1922, the court held:

> "Certainly they then had complete legal title to the stock and to the dividends.
>
> * * * * * * *
>
> The stock distribution plainly was not void; the transfer of the legal title could not have been void; we interpret the probate court order only as one which found the transaction voidable, and so set it aside. * * * Even though then, in a sense, they lost legal title to the dividend fund, and even though this loss could be carried back by relation four years, still they always had the equitable title. If in 1922 the legal title was one they held in trust for the executors, yet this equitable title of the executors was in turn held in trust for the distributees. We cannot deduce from such a situation nonliability for the income tax" (p. 207).

The distinctions between the *Ford* case and the case at bar are obvious. In the *Ford* case, as the Circuit Court of Appeals pointed out so forcibly, the real ultimate ownership of the securities was undoubtedly in the heirs. True enough, the whole estate was subject to the claims of creditors. In fact, however, at the time of the distribution, the $4,000,000 of securities distributed were not needed to meet the claims of creditors. The creditors ultimately were paid out of the $2,000,000 retained by the executors in 1920. These heirs, therefore, having the ultimate ownership of the securities distributed in 1920, got possession of the securities and collected the income from them. The action of the executors by which the heirs got possession was premature, irregular. Nevertheless they, the ultimate owners, had possession and collected the income. The state court indeed never did actually annul the distribution of 1920, but only purported in 1926 to postpone its effect until 1922. Contrast that with the case at bar. The decedent received from the trustee $7167.19, one-third of the depreciation during the fractional year 1921. This was not money of which she had an ultimate ownership and which should have been withheld from her merely on account of the legal technicality. It was money in which she never had any right (*supra,* pp. 7-17) and in which the court ultimately held that she never had any right (*supra,* p. 25). It belonged equitably to the remaindermen and the trustee was bound to hold it with the rest of the corpus of the trust, not because of a legal technicality, but in order to protect the rights of the remaindermen.

Apart from these considerations, however, one thing alone makes the *Ford* decision utterly inapplicable. The

Ford decision is not based upon or governed by the subsections of section 219 of the Revenue Act of 1921, which we have discussed above (*supra,* pp. 3-6). These provisions could not have had any application to the *Ford* case. The *Ford* case did not involve any distribution of income by a fiduciary. The *Ford* case is based upon the actual receipt of the income directly by the heirs who then had the principal. Our case, however, is directly governed by the provisions of section 219. These provisions, as we have seen, make the basis of taxation in cases of this kind the amount "which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary, *whether or not distributed*" (subsection (b); subsection (d)). The test is not the amount *actually received by* the beneficiary, but the amount which, under the instrument or order governing the distribution, *he should have received.* Under these sections actual receipt of income becomes a false quantity. This is the fundamental difference between the *Ford* case and the case at bar.

In cases of this kind the binding force of decisions of the state courts has frequently been recognized.

> "It is very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will. The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton v. Moore,* 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."
>
> *Uterhart v. United States,* 240 U. S. 598, 603.

"We should lean toward an agreement with the state courts, especially in a matter like this."
Messenger v. Anderson, 225 U. S. 436, 445.

(This opinion, of course, reverses that of the Circuit Court of Appeals, *Messenger v. Anderson,* 171 Fed. 785, upon which petitioner relies (Pet. Br. p. 31).)

"This case concerns federal taxes collected from the Girard Trust Company, executor and trustee under the will of John J. Emery. They were paid under protest, and this is a suit against the government to recover them back. Such recovery was allowed in the court below, whereupon this writ of error was taken. The statutes involved are the Revenue Act of 1916 (39 Stat. 756), as amended by the Act of March 3, 1917 (39 Stat. 1000), and the Act of October 3, 1917 (40 Stat. 300), and the question involved is, as stated by the court below, 'whether the tax should be measured by the trust estate income in bulk or by the shares of that income divided among the beneficiaries separately.'

"The facts are that John J. Emery, a resident of the state of Maine, died on September 5, 1908, leaving a will in which he directed that the funds involved here should accumulate. While his estate was in the course of administration, the gross income upon this fund was assessed with taxes for the years 1916, 1917, and 1918. Thereafter the question of validity of this accumulation trust was raised in the court of Maine having jurisdiction, with the result that by its decree, which was finally entered by consent, it was adjudged that 'the complainants were entitled to the residuary estate absolutely and in fee, free of any trust, as well as the income therefrom with accumulations thereon.' Referring to this decree, the court

below said, and we agree thereto, that 'this will sins against the policy of the law and the statutes enacted to enforce it is in effect admitted. That policy and these statutes nullify all provisions of wills which create perpetuities and limit accumulations to a prescribed period of time.' The effect of this decree was that, as to the fund here in question, which constituted the residuary part of the estate, the testator died intestate. Consequently the funds here in question did not pass as a trust, but as the residuary estate of the decedent, which belonged to his several heirs. *The differing conclusions of the government and of these taxpayers depend on the time at which the tax status is fixed.*

"The contention of the government is that, when these taxes were laid, the trust provisions of the will were then in force, and that *the government was entitled to levy its tax according to the then situation,* and consequently to tax the income as one accruing to the estate in gross as a trust. The contention of the taxpayer is that *the trusts were then void, although not so judicially determined,* and that the real situation was that the fund was really held by the trustee, who was also executor, as a residuary intestate estate, although that fact was not then, but subsequently, so decreed when the trust was adjudged void. We are of opinion that the *taxation acts as to estates were passed by Congress with appreciation of the fact that, as a practical administrative question, estates would often be in an undetermined situation incident to subsequent litigation as to rights thereto, and the taxation liability could not in such cases be fairly determined and justly laid until such disputed questions were determined. In the light of this practical consideration, we are of opinion the taxpayer's*

right and liability depended on facts, and not on appearances; that such facts, though subsequently determined by judicial decree, justly referred back, in this case, for example, to the date of the testator's death, and the rights which then, as found by subsequent decree, really accrued.

"The court of Maine had the settlement of this estate in its grasp and sole jurisdiction. It was for it to determine whether the fund in question was an accumulating trust, held by the Girard Trust Company under a valid trust created by the will, or whether such trust was invalid, and that, consequently, as to this fund the testator died intestate, and that therefore it was in the hands of the Girard Trust Company as executor, and the real owners were the decedent's heirs under the intestate law. Such being the fact, it follows that the income of this fund was not the property of a trust estate accruing under a trust, but was the income payable individually to the several persons who inherited under the intestate laws.

"It therefore seems to us that this situation was one aptly described by the proviso of the statute here quoted: 'Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their estates, and also such income of estates or any kind of property held in trust: * * * Provided, that where the income *is to be distributed* annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.' Comp. St. Sec. 6336b. *As the facts were ultimately adjudged, the income regularly accruing on this residuary estate was regularly payable to the owners of it, and was taxable as their incomes.*

"The judgment below, which held the tax should be assessed, not in gross, but upon the individual shares of the heirs, is affirmed."

McCaughn v. Girard Trust Co., 19 F. (2d) 218, 219.

"Because of the probate of the trust deed, and what has been said by the highest court of the state as to the validity of its clauses, the case is different than it was when here before (298 F. 894), and also from the case presented before the First circuit in 275 F. 513. We are not now at liberty to hold that the trust deed was invalid as a testamentary disposition."

Boal v. Metropolitan Museum of Art, 19 F. (2d) 454, 459.

"It cannot be contended for a moment that the Rhode Island court of probate and probate appeals lacked jurisdiction to determine what constitutes a will under the laws of that state. In fact it is the only court having such jurisdiction. Having determined that fact all other courts are bound by its decision relating thereto."

Atwood v. Rhode Island Hospital Trust Co., 34 F. (2d) 18, 22.

"The defendant and the federal courts are bound by the decisions of the appropriate state courts upon the probate of wills and their construction."

Hidden v. Durey, 34 F. (2d) 174, 178.

"Hence the case turns upon whether, after the Illinois decree, Marshall had a present interest in the income of Henry's share assignable under the law of Illinois.

* * * * * * * * *

"Under the trustees' contention Henry's share after his death was still subject to the provisions for accumulation, the restraints on alienation and the contingent remainders over. We need not consider the validity of these for we must accept the decree as holding that Henry's share was not so limited after his death."

Commissioner v. Field, 42 F. (2d) 820, 822.

"The effect of the above decision, as we construe it, is that the trust was not void, but only those provisions providing for the accumulation of income. *The fact that such decision was rendered after the taxable years in question does not, in the opinion of the respondent, affect the taxability of the trust during those years* on the income which under the provisions of the will was to be accumulated. We can not agree with his position.

* * * * * * * * *

"As finally determined in the instant case the trust was not one for the accumulation of income, or one in which the trustees were granted discretion as to the distribution, but the income was vested in the beneficiaries and they were entitled to receive the same from the date of the testator's death. *That right, although subsequently determined, fixed the status of the income for the taxable years in question.*

"Section 219 (a) (4) of the Revenue Act of 1918 provides that the tax imposed by sections 210 and 211 shall apply to the income of any kind of property held in trust, including income *which is to be distributed* to the beneficiaries periodically, whether or not at regular intervals, and subdivision (d) of the same section provides that in cases under paragraph (4) of subdivision (a) the tax shall not be paid by the fiduciary. In our opinion the income in question

for the years 1918, 1919 and 1920, falls within the above provisions and is therefore not taxable to the petitioners.

* * * * * * * * *

"The situation in regard to the undistributed income for the year 1917 necessitates separate consideration due to the difference in the wording of section 2 (b) of the 1916 Act and section 219 of the 1918 Act. Section 2 (b) provides that the income of any kind of property held in trust shall be taxed to the trustee, except when the income is returned for the purpose of the tax by the beneficiary, '*Provided,* That where the income *is to be distributed* annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.' Thus it will be seen that under the above section the only provision for the payment of the tax by the beneficiary is where the beneficiary has returned the income for the purpose of the tax. In all other cases the income is to be assessed to the executor, administrator, or trustee. The proviso does not designate another person against whom the tax is to be assessed, but provides that where the income is to be distributed annually or regularly between the beneficiaries the rate of tax and method of computation is to be based upon the amount of the individual share to be distributed, rather than upon the income of the trust in bulk. We are therefore of the opinion that for the year 1917 the petitioners are taxable upon all the income in question. See *McCaughn v. Girard Trust Co., supra;* and *Wooley v. Malley* (D. C.), 18 Fed. (2d) 668; 6 Am. Fed. Tax Rep. 6663."

Appeal of Appell, 10 B. T. A. 1225, 1231-32.

"In the cases which we are considering the amounts in question had not been paid to the beneficiaries, but were retained by the trustees with approval of the court having jurisdiction thereof and that in a state where the rule of law applicable to the situation here existing is in accord with the action taken by the trustees. Under such circumstances, we are unwilling to say that the course pursued by the trustees constituted an unauthorized withholding of income from the beneficiaries."

White v. Commissioner, 25 B. T. A. 243, 251.

In connection with his citation of the *Fidelity* and *Ford* cases, petitioner mentions *Burnet v. Sanford & Brooks Co.,* 282 U. S. 359, as supporting his suggestion that instead of taking the depreciation out of income distributable to the decedent in the fractional year 1921, the Board should have applied the total amount of depreciation returned by the decedent and respondent to "reducing the income of the year of payment" (Pet. Br. p. 37). The suggestion is clearly unsound. The respondent is not engaged in business and certainly cannot deduct this amount as a business expense. Moreover, it has been held, and very definitely:

"The trustees simply erred in distributing to the petitioner a greater amount in 1920 than she was rightfully entitled to under the provisions of the trust indenture, which for our purpose must be regarded as creating an obligation on the part of the petitioner to reimburse the estate, out of future 'distributable' income, the amount which had been erroneously credited or distributed to her. The error sought to be rectified occurred in 1920 and it is in that year, at

> least for income-tax purposes, that it must be corrected."
>
> *Pyle v. Commissioner,* 16 B. T. A. 218, 223.

Perhaps the greatest significance to be found in petitioner's brief on the subject of this order of the state court here is that while endeavoring in every way to make out that the decision of the state court is not binding upon the tax authorities, nevertheless *petitioner at no time endeavors to establish that the decision of the probate court actually was wrong.* As we have shown, the decision was right and was in accord with the general law (*supra,* pp. 7-25).

This is emphasized by petitioner's repeated assertions that "the orders entered by the probate court in San Francisco *retroactively changed* the taxable status of income distributed during prior years" (Pet. Br. pp. 2, 12, 21, 32). From what we have said it must be clear that no such change, retroactive or otherwise, was involved in the order of the probate court. That order simply declared the law already existing (*supra,* p. 25).

Petitioner cites other cases as holding "that the decision of the state court cannot divest parties of rights which have previously accrued under a federal statute" (Pet. Br. pp. 33, 37). The four cases cited, *Burgess v. Seligman,* 107 U. S. 20; *Anderson v. Santa Anna,* 116 U. S. 356; *Great Southern Fire Proof Hotel Company v. Jones,* 193 U. S. 532; and *Kuhn v. Fairmont Coal Co.,* 215 U. S. 349, deal with no federal statute. They do not involve a situation like that here where the probate court proceeding, as it were *in rem,* "had the settlement of this estate in its grasp and sole jurisdiction" (*McCaughn v. Girard,* 19 F. (2d) 218; *supra,* pp. 47-50). For a careful

consideration of the limits to which the doctrine of these cases cited by petitioner must be confined, it is only necessary to refer to the dissenting opinion of Mr. Justice Holmes in the *Kuhn* case.

In our specific situation, some of the cases we have already cited (*supra,* pp. 46-53) concerned state decisions rendered after the rights had accrued which were involved in the federal litigation. Nevertheless, the federal courts had difficulty in recognizing the binding effect of the state decisions. "Retroactivity" did not disturb them. We have in mind

Uterhart v. U. S., 240 U. S. 598 (*supra,* p. 46);

Messenger v. Anderson, 225 U. S. 436 (*supra,* p. 47);

McCaughn v. Girard, 19 F. (2d) 218 (*supra,* pp. 47-50);

Boal v. Metropolitan Museum of Art, 19 F. (2d) 454 (*supra,* p. 50);

Atwood v. Rhode Island Hospital Trust Co., 34 F. (2d) 18 (*supra,* p. 50);

Appeal of Appell, 10 B. T. A. 1225, 1231-1232 (*supra,* pp. 51-52).

This must dispose of the argument pressed by petitioner that a decision adverse to him in this particular case would be "paving the way for grave abuses" (Pet. Br. pp. 12, 38). No abuse whatever can be involved here. The decision of the probate court was in accordance with the will and the general law (*supra,* pp. 7-25). The statute imposes a tax upon the amount distributable pursuant to the will and the order, disregarding the amount actually distributed (*supra,* pp. 3-6). Upon any undistributable net income the trust estate is taxable (Revenue Act of

1921, section 219, subsection (e)). The result is that the total net income of the trust estate is bound to be taxable. Not a cent of net income can escape taxation; not a cent of net income actually has escaped taxation in the instant case. Petitioner, however, is seeking to tax, not the total net income of this family, but a greater sum. Because payments were made to the decedent in excess of her share of the net income of the trust, in excess of the amount distributable to her by her husband's will, in excess of the amount, the distribution of which the general law would permit, in excess of the amount ultimately determined by the order of the probate court, petitioner is seeking to levy a tax upon these payments, which could be nothing more or less than a capital transaction and not income at all. While not a grave and far reaching abuse, we submit that a rank injustice would be done by the enforcement of such a tax.

D. PETITIONER'S BRIEF DOES NOT COMPLY WITH RULE 24 OF THIS COURT.

We have been somewhat embarrassed in our presentation of the foregoing argument because of the failure of petitioner to comply with the requirements of Rule 24 of this court. It is not clear from his brief precisely what petitioner regards as the questions involved. He does not show the manner in which they are raised. There is no specification of errors. The petition for review (R. 55-59) does contain five assignments of error (R. 58). The brief does not refer to them and does not show that they are in any way connected with the argument in the

brief. We do not find that these assignments raise any of the particular points discussed in the brief.

The first assignment is:

> "1. The Board erred in holding that the distributions made by the trustee to said Louise P. V. Whitcomb were not income to her in their entirety" (R. 58).

We find nothing in the record showing that there was any such holding. Nor could such a holding have been material to the case as the Board understood it. The question is not what was or was not income, but in this, as in every case, what was the amount to be included in the decedent's return in computing her taxable net income. The Board quoted the pertinent provisions of the act which, as we have said, includes the amount "which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not" (R. 43). The Board, therefore, undertook to determine, not the amount distributed, but the amount "distributable" (R. 44, 48).

The second assignment is:

> "2. The Board erred in holding that the distributions of the income of the trust received by said Louise P. V. Whitcomb without diminution on account of depreciation sustained by the trust property were not taxable income to her in their entirety" (R. 58).

Again, we know of no such holding. The Board merely found the facts and made the decision stated above.

> "3. The Board erred in holding that a payment made in a subsequent year and not shown to have re-

> lated to an alleged excessive depreciation in the taxable year had the effect of keeping any portion of the distribution in the taxable year from being income to the taxpayer'' (R. 58).

Certainly the Board did not hold anything of this kind. It refused to consider any such question. What the Board said regarding the subsequent payments was:

> ''This, however, does not in our opinion change the situation. The amounts in question did not belong to the petitioners, and in our theory of the law cannot be income to them. Whether the petitioners ever repay such amounts to the trustee is a matter between them and the trustee and the other parties interested in the trust'' (R. 48).

We understand that petitioner concurs (Pet. Br. p. 23; *supra,* p. 31).

The fourth assignment is:

> ''The Board erred in holding that the decree of a Court passed in a subsequent year in a friendly suit to which the Government was not a party could affect the Government's right to income tax in the year in which the income was received'' (R. 58).

As to this, of course, it is apparent that the Board did not hold that this was a ''friendly suit'' (*supra,* pp. 28-29). Nor do we believe that the decision of the state court did ''affect the Government's right to income tax,'' because, as we see it, the decision of the state court was simply declaratory of the existing law. The ground of decision by the Board was its construction of the will (R. 48). It

is true that in argument the decision of the state court is mentioned, followed by the remark:

> "Its decrees with respect to the trust are also binding on the several Federal Courts (*Uterhart v. United States,* 240 U. S. 598" (R. 44-45).

This decision of the supreme court of the United States seems to us amply to sustain the Board's remark. See also the other authorities cited (*supra,* pp. 46-53).

The fifth assignment is simply:

> "5. The Board erred in not approving the deficiency proposed for assessment by the Commissioner" (R. 58).

This is nothing more than a general statement that the Board's decision was wrong. It is not an assignment of any specific error.

None of the assignments is well taken. Petitioner noticed the assignments in the record and has not complied with the definite rules of this court. His attempt to write a brief urging mere general grounds not specifically assigned, must fail.

5. CONCLUSION.

The real question in this case is as to the effect of the will under the specific circumstances presented, with particular relation to the question whether the trustee should maintain a depreciation reserve. Another way of stating the same thing is to say that the question is whether the decree of the state court requiring the trustee to maintain such a reserve is right or wrong. Neither phase of this subject is discussed in petitioner's brief. There is much discussion of whether state or federal law is to be applied in giving effect to the will. There is no consideration whatsoever as to what either the state or the federal law on the subject is. There is much discussion as to whether or not the order of the state court is binding upon the parties here. There is no attempt whatever to show that that order was erroneous. On the other hand, we have shown definitely that the will can only be construed in the way in which it was effectuated by the state court and that the maintenance of a depreciation reserve was required. This ends the case, because the statute fixes the tax, not upon the amount actually distributed, but upon the amount distributable under the will and order (*supra,* pp. 3-6). No case has been cited holding or suggesting that under this statute the beneficiary is taxable upon amounts in excess of the amount distributable under the will and order merely because such excessive distributions may have actually been made for one reason or another. All of the cases upon which petitioner relies so confidently, including the earlier decisions of the Board and the court, under the Whitcomb will itself, were based upon circumstances existing or assumed that the amounts

distributable actually were such that no depreciation reserve could be maintained.

It is respectfully submitted that in the case at bar, where the only amount distributable was the net income after setting aside a depreciation reserve, the Board was right in holding that the beneficiaries were taxable only upon the net income.

Dated, San Francisco, California,
November 21, 1932.

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No. 6835

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

JOHN FREULER, Administrator of the Estate of Louise P. V. Whitcomb, Deceased,
Respondent.

REPLY BRIEF FOR RESPONDENT.

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REPLY BRIEF FOR RESPONDENT.

I. PRELIMINARY STATEMENT.

The court asked that the reply brief be confined to the two questions of law presented by the case. We, therefore, summarize those issues first in this reply (*infra,* pp. 2-49). Petitioner has frankly exceeded the leave given by the court regarding reply briefs (Pet. Rep. p. 1), and has discussed various matters outside of these two questions of law. We assume that the court will wish us to note them briefly as we have done below (*infra,* pp. 50-58).

II. ARGUMENT.

1. WHEN A TRUSTEE, ACTING UNDER A RESIDUARY DEVISE OR BEQUEST WHICH CONTAINS NO SPECIFIC DIRECTIONS ON THE SUBJECT, PURCHASES WASTING SECURITIES THE LAW IMPLIES AN OBLIGATION TO PROVIDE PROPER AMORTIZATION (Res. Br. pp. 6-25).

Primarily the question whether or not a depreciation reserve must be maintained by a trustee is one to be settled by the creator of the trust. In numerous cases, however, as in the case at bar, trusts have been created by wills with no specific directions on the subject. Like other questions of construction, the courts on this question have established certain principles.

Special cases as of the specific devise of wasting assets,

Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548 (Res. Br. p. 15);

In re Chapman, 66 N. Y. S. 235, 238 (Res. Br. p. 17);

Reed v. Longstreet, 71 N. J. Eq. 37, 63 Atl. 500 (Res. Br. pp. 20-21);

Gay v. Focke, 291 Fed. 721 (Res. Br. p. 21),

must be set aside as involving evidence or supposed evidence of a testamentary intent opposed to the general rule. The authorities have discussed three types of wasting assets:

1. Tangible depreciable property

Matter of Houseman, 4 Dem. 404 (Res. Br. pp. 7-8);

Hill on Trustees (Am. Ed.) 592-593 (Res. Br. p. 16);

Newbury v. Commissioner, 26 B. T. A. 101, 106-107 (Res. Br. pp. 23-24).

2. Bonds purchased at a premium

In re Gartenlaub, 185 Cal. 648, 652 (Res. Br. p. 9);

In re Stevens, 187 N. Y. 471; 80 N. E. 358, 359-360 (Res. Br. pp. 9-10);

New England Trust Company v. Eaton, 140 Mass. 532; 4 N. E. 69, 71-72, 74, 77 (Res. Br. pp. 10-12);

In re Allis' Estate, 123 Wis. 223, 101 N. W. 365, 368 (Res. Br. pp. 12-13);

Furniss v. Cruikshank, 230 N. Y. 495, 130 N. E. 625 (Res. Br. p. 13);

New York Life Insurance & Trust Co. v. Baker, 165 N. Y. 484, 59 N. E. 257 (Res. Br. p. 13);

Gould v. Gould, 213 N. Y. S. 286 (Res. Br. p. 13);

Kemp v. Macready, 150 N. Y. S. 618 (Res. Br. pp. 13, 18-19);

Dexter v. Watson, 106 N. Y. S. 80 (Res. Br. p. 13);

Curtis v. Osborn, 79 Conn. 555, 65 Atl. 968 (Res. Br. p. 13);

Ballantine v. Young, 74 N. J. Eq. 572, 70 Atl. 668 (Res. Br. p. 13);

In re Wells' Estate, 156 Wis. 294, 144 N. W. 174 (Res. Br. p. 13);

Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548a (Res. Br. p. 16);

Simon v. Commissioner, 10 B. T. A. 1186, 1188 (Res. Br. p. 25).

3. Valuable leaseholds

Healey v. Toppan, 45 N. H. 243, 266-267 (Res. Br. p. 13);

In re Hall's Estate, 224 N. Y. S. 376, 381 (Res. Br. pp. 13-14);

In re Murphy's Estate, 246 N. Y. S. 714 (Res. Br. p. 14);

In re Golding's Estate, 216 N. Y. S. 593 (Res. Br. p. 14);

Perry on Trusts and Trustees, 7th Ed., Vol. II, par. 548 (Res. Br. p. 15);

Hill on Trustees (Am. Ed.), 592-593 (Res. Br. pp. 15-16);

Gay v. Focke, 291 Fed. 721 (Res. Br. pp. 21-23).

In any such case the trustee makes the investment, purchases the wasting asset, for exactly the same reason that any other person makes an investment in such an asset. In every investment the investor has in mind two things, the ultimate return of his principal and meantime the receipt of an income. Where the investment is a wasting asset the investor requires that the periodical return from the investment be greater than in other cases; the investor must not only receive a periodic return commensurate with that which he would receive in other investments, but also an additional amount to refund some part of the principal invested. Precisely these considerations must be regarded by a trustee when he makes an investment of this kind. When the trustee has two sets of beneficiaries, life tenants entitled to the income during the term of the trust and remaindermen entitled to the principal on the termination of the trust, equity is done between the two classes of beneficiaries by giving to the life tenants the portion of the gross income received periodically which represents the true earning on the investment, and by retaining for the benefit of the remaindermen the portion of this gross income

which represents a return of capital. With this fund the trustee sets up a depreciation or amortization reserve. The principal of this fund, of course, he may again invest and the life tenants are entitled to the earnings. The problem is the same whether the wasting investment be tangible property or intangible, like bonds selling above par and a leasehold worth more than the periodic rental.

Petitioner tries to distinguish between these different kinds of wasting investments (Pet. Rep. pp. 2-3). The effort is to place on one hand the cases of bonds purchased at a premium and on the other hand all other purchases of wasting assets. No such distinction is made by the authorities. As we have seen, all recognize that the same legal and economic problem is involved in each class of cases. Seeking to support his argument that bonds, the second class of wasting assets, should be treated differently from the first and the third classes (*supra,* pp. 2-4), tangible properties and valuable leases, petitioner says:

> "When bonds are purchased at a premium there is an immediate loss—a conversion of money into the promise of repayment of a lesser amount" (Pet. Rep. p. 3).

This is by no means true. No investor would make such a purchase, would face such an immediate loss. If the bond is ultimately paid no loss is involved, simply the capital has been returned partly in installments and the rest in the repayment of the par value. Apart from market fluctuations, the bond is worth no less the day or the instant after its purchase than it was before. Normally

the purchaser could sell the bond immediately at the same price which he paid for it. Sometimes he is so fortunate as to be able to sell it at a greater price. Contrast this with an everyday transaction, the purchase of a notoriously wasting tangible asset. A new automobile is purchased from the agent. As soon as the buyer drives it out of the agency there is, in fact, a definite loss—in resale value, in insurable value. This is simply because a brand new car is worth more than a "used car." More or less the same is true in the case of the purchase of any tangible depreciable property. Undoubtedly the furniture installed in the Whitcomb Hotel was worth less the day after it was installed than it was the day before on the floor of the merchant's shop. If there were any distinction of the kind suggested by petitioner, every consideration is in favor of the loss being more immediate on the purchase of a depreciable tangible asset than it is on the purchase of a bond.

Pressing this same argument about depreciation of wasting assets, other than bonds, petitioner says:

> "Practically it may never be realized as a loss in any given case" (Pet. Rep. p. 3).

It is, of course, conceivable that market fluctuations might be such that tangible depreciable properties, an old hotel building, second hand hotel furniture, might at some time be saleable for more than their original purchase price. That, however, is a false quantity. The same argument was made, indeed, about bonds themselves.

> "This loss of the remainder-man may, however, be reduced if the life estate falls in before the bonds

mature, and while they are still quoted at a large premium."

In re Hoyt, 160 N. Y. 607, 55 N. E. 282, 285 (Res-Br. pp. 17-19).

There is simply nothing in the distinction suggested by petitioner between the various classes of wasting assets.

We agree with petitioner's statement regarding depreciation that:

> "Whether it shall be borne by life tenant or remainderman is primarily a question of the construction of the instrument creating the trust" (Pet. Rep. p. 3).

We submit, however, that in construing the instrument the court acts in accordance with settled principles. Petitioner concedes that:

> "it is quite clear that in California and probably a majority of the states the trustee purchasing bonds at a premium is obliged to reserve from income a sum sufficient to amortize the premiums paid so that the capital is kept intact. This seems to be the rule announced by the Supreme Court of California in *Estate of Gartenlaub,* 185 Cal. 648, 198 Pac. 299, and it is also the rule adopted by the Supreme Court of the United States in *New York Life Insurance Co. v. Edwards,* 271 U. S. 109" (Pet. Rep. p. 2).

Surely petitioner does not mean by this to state a rule of law peculiar to the purchase of bonds at a premium which would override testamentary intent as ascertained by the contruction of the will. All that this statement can be is petitioner's acknowledgment of a well recog-

nized rule of construction which is just as applicable to the purchase of other kinds of wasting assets as it is to the purchase of bonds.

Petitioner cites this court's decision in *Gay v. Focke,* 291 Fed. 721 (Res. Br. pp. 21-23), as showing a disposition to apply to other kinds of wasting assets, specifically to a lease, some rule of construction different from that applied in the case of bonds. Obviously petitioner cites the case now without having given consideration to our discussion of the case (Res. Br. pp. 21-23). As there shown, the decision of this court in the *Gay* case applied to the Hawaiian leases the precise principles applied by other courts in regard to the amortization of other wasting assets. One lease had been bequeathed specifically. According to *Perry's* remark (Res. Br. p. 15) and the *Chapman* case (Res. Br. pp. 16-17) the life tenants would be entitled to the full income without any deduction for amortization (*supra,* p. 2). That is precisely what this court held regarding that lease. In the *Gay* case, however, there was also another lease which passed under a residuary bequest. The Hawaiian court held that that lease was subject to amortization in accordance with the general principles applied in the case of bonds and other wasting assets. The question was not raised on appeal. The cases which this court cited, however, in discussing the computation of this amortization, showed that it did not regard the decision of the Hawaiian court on this point as incorrect.

Passing to the construction of the Whitcomb will, petitioner says:

"Certainly there is nothing in the will to indicate"

the testator's desire

> "that the corpus should be unimpaired" (Pet. Rep. p. 3).

We submit that there are two specific features of the will which indicate the desire to maintain the corpus. The first is the language in which the testator disposes of the income, to which he applies the term "interest" (R. 35). The second is the language with which he disposes of the remainder "of the *whole* three-thirds parts" (R. 35). General principles of construction, as we have said, do not require in a case of this kind affirmative evidence of the desire of the testator that those general principles be applied in the construction of the will. Nevertheless, short of express direction that a depreciation reserve be maintained, it is hard to conceive of any language which a testator might have used which could be more apt to require the application of these general principles of construction.

Most of the remainder of the matter under this first point in petitioner's reply brief seems pertinent in no way to the discussion of the general question of law, which was one of the two to which the court directed that our reply briefs be devoted.

Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 Pac. 898 (Pet. Rep. p. 3) is not a testamentary trust, involves no question of the rights of life tenants and remaindermen and has nothing to do with any question of depreciation or other treatment of wasting assets. Petitioner cites it as holding that the terms of the trust instrument govern the duties of the trustee. Such a decision can be of no

assistance here where the question is one of construction of a will in which there is no specific direction as to the trustee's duties in connection with this particular problem.

Bryson v. Bryson, 62 Cal. App. 170, 175, 216 Pac. 391 (Pet. Rep. pp. 3-4) likewise involves no testamentary trust, no question of the rights of life tenants and remaindermen, no question of depreciation or other treatment of wasting assets. It states, indeed, that the trustee is bound by the provisions of the trust instrument, but it is of no assistance in our problem—the proper construction of the trust.

Petitioner cites Section 101 of the Probate Code (Pet. Rep. p. 4) to the effect that the will must be construed according to the testator's intent. Of course this does not mean that the courts are to make use of no established principles of construction in ascertaining the testator's intent. For if it did, all of the succeeding portions of the Probate Code, Sections 102-126, would be unnecessary. Petitioner misunderstands Section 163 of the Probate Code which he says

> "subordinates the provisions *of the code itself* to the testator's express intention" (Pet. Rep. p. 4).

The section reads:

> "The provisions *of this chapter* are in all cases to be controlled by a testator's express intention."

The chapter is chapter 8 of division 1. None of its provisions are in any way involved in the case at bar. Section 163, therefore, has no bearing whatever.

Departing still further from the specific question of law upon which the court asked the assistance of briefs, peti-

tioner cites *In re Leupp,* 108 N. J. Eq. 49, 153 Atl. 842 (Pet. Rep. p. 4), in support of an alleged estoppel of the beneficiaries to question certain acts of the trustee in the knowledge of which they had accepted distributions of income for sixteen years. It is certainly late for petitioner to inject such a question into the case. The question was not raised before the board, is not presented by any of the assignments of error (Res. Br. pp. 56-59), nor by the corresponding "specification of errors" which petitioner inserted in his brief by amendment (Pet. Br. p. 11). A glance at the record, however, shows that there could be no such estoppel in the case at bar. Instead of receiving the income with knowledge of the trustee's acts as the beneficiaries did in the *Leupp* case, it appears that the objecting beneficiaries here, Napoleon Charles Louis Lepic and Charlotte de Rochechouart (R. 38), never have had a right to receive any of the income and never have received any of the income (R. 36-37). The fact that they were minors during most of this period does not appear directly from the record. It does appear, however, that their mother was born December 4, 1882 (R. 35). The eldest of them, therefore, may well have been born about 1903. That both of them were minors during the year 1921 and thereafter is a reasonable inference from the record. That neither of them at any time had any knowledge of the trustee's accounting methods is a matter on which the record is absolutely silent. As to the other remaindermen, Lydia L. Whitcomb and Louise A. F. E. Whitcomb, neither of them received any income prior to 1914. Their minority is an admitted fact in the case (Consolidated, Amended and Supplemental Petition, par.

1 (a) and 1 (b), R. 13; Answer, R. 29). Certainly there could be no question of estoppel on the part of the remaindermen in the case at bar.

Equally disconnected from the question of law as to which the court directed the briefs is petitioner's statement that

> "The orders of the probate court * * * do not in themselves stamp the distributions as unlawful" (Pet. Rep. pp. 4-5).

The order sustained objections to the account because no reserve or other provision for depreciation had been made (R. 39). It adjudged that specific amounts were proper amounts for depreciation during each of the years covered by the account (R. 39-40). It absolved the trustee from personal liability (R. 40-41). It ordered the recipients to repay the excessive amounts (R. 41). It required the maintenance of a depreciation reserve in the future (R. 41). We fail to see how a court could have been more plain in its expression of its intent to

> "stamp the distributions as unlawful" (Pet. Rep. p. 5).

All that petitioner can mean by this paragraph is that the court erred in absolving the trustee from personal liability. Assuming that error existed this, as the board said "is a matter between them and the trustee and the other parties interested in the trust" (R. 48). It certainly has nothing to do with the question of general law thoroughly briefed by us (Res. Br. pp. 6-25) but ignored in petitioner's brief (Res. Br. p. 25) to which the court ordered that these briefs be directed.

Still pursuing, not the question of law, but questions of fact regarding the administration of this particular trust, petitioner quotes our remark that

> "there was no depreciation question prior to 1913" (Res. Br. p. 29)

and retorts

> "Obviously depreciation was not created by the Sixteenth Amendment" (Pet. Rep. p. 6).

If the innuendo is intended that our concern about depreciation only exists in order to escape income tax, we must insist that the passage quoted by petitioner from our brief be read in connection with the earlier passage to which it referred.

> "For twenty-seven years from the time of A. C. Whitcomb's death in 1889 until 1906, when the fire resulted in a change in the investment policy of the trustee, no material part of the corpus of the trust estate was depreciable or a wasting asset of any other kind. The question of depreciation, therefore, did not arise. From 1906 until 1913 the trustee was engaged in various stages of the construction of the Whitcomb Hotel. Any attempt to base an argument, therefore, upon anything done by the parties to this trust in the treatment of depreciation prior to 1913 must fail. There was not and could not have been any question of depreciation before 1913" (Res. Br. p. 28).

All argument about the matter of depreciation prior to 1913 is beside the point. There is no finding by the Board of Tax Appeals (R. 36) that any depreciation existed prior to 1921, the year involved in this case. The only

intimation that there was prior depreciation is the finding of the probate court, which shows that there was depreciation in the years from 1913 on (R. 40). Nowhere is there anything in the record showing that there was depreciation prior to 1913.

This court having ordered briefs on questions of law alone, we had hoped that further discussion of mere assertions of fact would be avoided. Yet we find under the discussion of this first law point a repetition of the attack on the decree of the probate court here (Pet. Br. pp. 2, 11, 15, 16, 21, 22, 32; Res. Br. pp. 28-29). The charge now is that the "decree of the probate court was for all practical purposes a consent decree" (Pet. Rep. p. 6). Again petitioner disclaims any charge of collusion (Pet. Br. p. 6, note 3). To us the charge and the disclaimer seem inconsistent. It is idle, however, to attempt an analysis. The fact is that the record contains no finding whatever tending in any way to impeach the order of the probate court. At the argument petitioner went outside of the record to urge this charge. At that time we offered to go outside the record and to state the facts obviously unknown to petitioner's counsel regarding the probate court procedure. This court properly declined to hear any such discussion. We assume that it will, therefore, disregard the baseless charge now made by petitioner.

Again without any bearing upon the general question of law on which the court asked assistance, petitioner goes outside of the record to discuss the proceedings pending regarding income taxes for the earlier years (Pet. Rep. pp. 6-7). He intimates the possibility that

> "*Whitcomb v. Blair* and the associated Board decisions" (Pet. Rep. p. 7)
>
> "established the law of the case" (Pet. Rep. p. 7)

and of

> "relying on the doctrine of *res judicata*" (Pet. Rep. p. 7).

Neither respondent nor his decedent was a party to *Whitcomb v. Blair*. They are not concerned with that case. Certainly it cannot be *res judicata* against respondent in any sense. So far as respondent is concerned it could not establish the law. Respondent obviously was entitled to his day in court.

Still staying outside the record, petitioner remarks:

> "it is peculiar that no effort was made to have *Whitcomb v. Blair and the associated Board decisions* reviewed by higher authority" (Pet. Rep. p. 7).

The court, we trust, will pardon our diversion from the record so far as to permit us to advise the court of something apparently unknown to petitioner, that is, that appropriate proceedings are pending in the district court against the Collector of Internal Revenue by respondent to review "the associated Board decisions" so far as respondent and his decedent are concerned in them. These proceedings have been deferred at the request of the United States attorney until the decision of this court upon this present appeal. So far, therefore, from "the associated Board decisions" being either *res judicata* or establishing the law of this case, the fact is that the ultimate decision of those cases depends largely upon the action of this court here.

Petitioner closes his discussion of this first point of law with the assertion that

> "the respondent has pointed to no direct authority" (Pet. Rep. p. 7)

on this general point of law. We submit that the principle being the same in regard to all kinds of wasting assets, all of the authorities cited by us on the point (Res. Br. pp. 7-25) are direct authorities in favor of our contention that in the absence of specific directions in the will the requirement of a depreciation reserve will be implied. Of our authorities,

> *Matter of Housman,* 4 Dem. 404 (Res. Br. pp. 7-8);
>
> *Hill on Trustees* (Am. Ed.), 592-593 (Resp. Br. p. 16); and
>
> *Newbury v. Commissioner,* 26 B. T. A. 101, 106-107 (Resp. Br. pp. 23-24),

specifically apply the general principle to the depreciation of furniture and improvements.

Petitioner says the question

> "arises under a Federal statute" (Pet. Rep. p. 7).

This is opposed to earlier language of the Commissioner.

> "The decisions of the local courts, however, as to the *distribution* of such items of income are important. They determine by whom the income should be accounted for. This makes it necessary that the *distributable* income be treated under class (4) and the capital gain or stock dividend under class (3) of section 219 (a)."
>
> O. 1013, 2 C. B. 181, 183-184.

The question, however, is not important since the federal law is settled in accordance with the state law, as to bonds on petitioner's own admission (Pet. Rep. p. 2), as to leases inferentially by the decision of this court (*Gay v. Focke,* 291 Fed. 721, *supra,* p. 8), and as to tangible property by the Board of Tax Appeals (*Newbury v. Commissioner,* 26 B. T. A. 101, 106-107, *supra,* p. 2). Petitioner repeats, however, his statements that the decisions cited in his earlier note (Petitioner's Br. pp. 20-21, note 2)

> "are believed to sustain beyond question the decision of the Court of Appeals in *Whitcomb v. Blair,* supra" (Pet. Rep. p. 7).

We agree that so far as *Whitcomb v. Blair* goes, it is in accord with the cases upon which petitioner relies (Pet. Br. pp. 20-21 note, Pet. Rep. p. 7), but as we have said (Res. Br. p. 34) the essence of *Whitcomb v. Blair* is that the court assumed without argument or discussion that, as a matter of fact, the depreciation was distributable. The construction of the will was not considered. It is on this matter of construction that this court has now asked the assistance of briefs. So far as those cases relate to the question of the maintenance of a reserve by the trustee, we can only repeat what we have already said that in those cases it was or was assumed to be the fact that the circumstances of the cases were not such as to require the application of the legal principles which are the subject of our present discussion (Res. Br. p. 34). Neither at the oral argument nor in his reply brief has the petitioner challenged this statement. At the oral argument, indeed, when the

court asked the petitioner for his views on the general question of law as to the requirement of the maintenance of reserves by trustees, the petitioner replied that he had not completed his investigation of the authorities and knew of none on the point. If by his present statement (Pet. Rep. p. 7) with regard to the cases cited in the note in his earlier brief (Pet. Br. pp. 20-21, note 2) petitioner means to imply that those cases are in any way opposed to what we have said on that general question of law, it is obvious that such a claim is a mere afterthought. In any event these cases could not sustain any such claim. As petitioner discusses them in detail in the subsequent division of his brief, we have inserted our analysis of them under that head (*infra,* pp. 41-46). It shows definitely that they do not affect the general question of law as to the duty of trustees to maintain reserves.

We submit, therefore, that on the first question of law whether a depreciation reserve was required in the case at bar, the California law, the general law and the federal authorities are all in accord and all require such construction of the will.

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2. UNDER SECTION 219 OF THE REVENUE ACT OF 1921 THE MEASURE OF THE TAXABLE INCOME OF THE BENEFICIARY OF A TRUST IS THE AMOUNT OF INCOME DISTRIBUTABLE TO HIM PURSUANT TO THE INSTRUMENT OR ORDER GOVERNING THE DISTRIBUTION.

This section speaks of

"income which is *to be distributed* to the beneficiaries periodically" (subdivision (a), paragraph 4).

In cases in which there is any income of the class described in paragraph 4 of subdivision (a) of this section, the fiduciary is required to include in the return

"a statement of the income * * * which, pursuant to the instrument or order governing the distribution, is *distributable to each beneficiary, whether or not distributed* before the close of the taxable year for which the return is made" (subdivision (b)).

"In cases under paragraph (4) of subdivision (a) * * * the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income * * * which, pursuant to the instrument or order governing the distribution, is *distributable* to such beneficiary, *whether distributed or not* * * * his *distributive share* of the income of the estate or trust" (subdivision (d)).

"In the case of an estate or trust the income of which consists both of the income of the class described in paragraph (4) of subdivision (a) of this section and other income, the net income of the estate or trust shall be computed * * * except that there shall be allowed as an additional deduction in computing the net income of the estate or trust that part of its income of the class described in paragraph (4) of subdivision (a) which, pursuant to the instrument or order governing the distribution is *distributable* during its taxable year to the beneficiaries * * * there shall be included, as provided in subdivision (d) of this section, in computing the net income of each beneficiary, that part of the income * * * which, pursuant to the instrument or order governing the distribution is *distributable* during the taxable year to such beneficiary" (subdivision (e)).

In the above the phrases italicized are manifestly synonymous. They all refer to what ought to be done, rather than to what has been done. Other portions of the section also assist in the interpretation.

> "There shall * * * be allowed as a deduction * * * any part of the gross income which, *pursuant to the terms of the will or deed creating the trust,* is during the taxable year paid or permanently set aside for" certain charitable purposes (subdivision (b)).
>
> "In any other case * * * in determining the net income of the estate * * * there may be deducted the amount of any income *properly paid* or credited to any legatee, or heir, or other beneficiary" (subdivision (c)).

Under subdivision (b) the amount of the deduction is not the gross amount paid for the purposes named but the amount so paid "pursuant to the terms of the will or deed creating the trust." Again, under subdivision (c) the executor may take a deduction not for the amount of income actually paid to legatees, etc., but for "any income *properly* paid or credited to any legatee, heir, or other beneficiary." Subdivision (a) 4 is concerned not with the income distributed periodically but "which *is to be* distributed * * * periodically." Subdivisions (b), (d) and (e) deal not with what is distributed, but with what is *"distributable * * * whether or not distributed."* In principle the provisions concerning the income of trusts which is to be distributed to the beneficiaries periodically (subdivisions (a), (b), (d) and (e)) are based on the same policy as that of subdivision (b) regarding charities and subdivision (c) regarding decedents' estates. The underlying theory is that taxes are determined, not by

the physical facts concerning the payment of the money, which might be affected by mistakes of the parties, either as to law or fact, or by the desire of the parties so to adjust these matters as to escape income tax, but by the legal rights and duties of the parties.

Our construction is in accord with the general policy of the income tax laws as shown by the various laws and the regulations under them.

The provisions of the Revenue Act of 1913 were very simple:

> "Guardians, trustees, executors, administrators, agents, receivers, conservators and all persons * * * acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all of the provisions of this section which apply to individuals" (section II, subdivision D).

"Trustees" are grouped here with "agents." The conception is that "they act" for the beneficiary. As soon as the trustee receives income which is distributable to any particular beneficiary the tax is imposed on the beneficiary just as if this receipt by the trustee were a constructive receipt by the beneficiary. On this theory, of course, it is immaterial when, if ever, the trustee actually passes the income over to the beneficiary. Neither overpayment by the trustee nor underpayment could have any effect upon tax liability. This theory was recognized by the Commissioner's rulings under the 1913 Act. Thus the Commissioner has said:

"Said fiduciary acts for and in behalf of the beneficiaries of said trust."

T. D. 1906.

See also:

T. D. 1911;

T. D. 1943.

"as each such fiduciary acts solely in behalf of the beneficiaries of the trust."

Regulations 33, art. 72, T. D. 1944.

See also:

T. D. 1961;

T. D. 1987;

T. D. 2090;

T. D. 2137;

T. D. 2231.

The Act of 1916

"Provided, that where the income is *to be distributed* annually or regularly between existing heirs or legatees, or beneficiaries the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share *to be distributed*" (section 2, subdivision (b), paragraph 4).

The same provision is found in the Revenue Act of 1917, section 2, subdivision (b), paragraph 4.

Under these laws, the beneficiary was taxable, not with the amount *distributed* to him, but with the amount *to be distributed* to him. For the rest of the income the fiduciary paid the tax. The policy was established early

that but one tax was to be collected on the net income of the estate where under the law the trustees had paid it.

T. D. 1906;

Regulations 33, article 75, T. D. 1944.

"The income of the estate being thus freed of income tax liability may thereafter be dealt with without further regard to income tax requirements."

Regulations 33, article 29, revised January 2, 1918.

An important decision illustrating this principle is that embodied in the letter from the Acting Commissioner to the Corporation Trust Company, dated March 24, 1917 (Corporation Trust Company 1918 Service, pp. 366-367, 1919 Service pp. 141-142). There had been a devise in trust, the decedent dying in September, 1913. Until 1916, however, distribution was impracticable. At that time the shares of the net income during the earlier years 1913, 1914 and 1915 were ascertained. The fiduciaries were then directed to make fiduciary returns in 1916 for the earlier years, reciting the interests of the beneficiaries. The beneficiaries were directed to make amended returns for the earlier years where their income was such as to require returns. The fact that actually a large amount of income was distributed in 1916 did not justify the imposition of a higher tax in that year upon all of that income. The income was allocated to the years in which it was *distributable,* rather than the one year in which it was *distributed.*

The Act of 1918 was in this respect very similar to the Act of 1921 involved here. The pertinent provisions of subdivision (a) of Section 219 of the two acts are

identical. There is a slight variation in subdivision (b), as shown by quotations in parallel columns from these two acts:

"Sec. 219. (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that	"Sec. 219. (b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that
there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214)	(in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) there shall also be allowed as a deduction, without limitation,
any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid	any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid
to	
or permanently set aside for the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and	or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of section 214.
in cases under	In cases in which there is any income of the class described in

paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's *distributive share* of such net income	paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is *distributable* to each beneficiary,
whether or not distributed before the close of the taxable year for which the return is made" (Act of 1918).	*whether or not distributed* before the close of the taxable year for which the return is made" (Act of 1921).

The passages in subdivision (c) use identical language.

Subdivision (d) differs in the two acts by the same change of language which we have seen in subdivision (b). There is no subdivision (e) in the 1918 Act.

Interpreting these sections the regulations say:

> "Where the tax has been paid on the net income of an estate or trust by the fiduciary, such income is free from tax when distributed to the beneficiaries" (Regulations 45, article 344).
>
> "In the case of (a) a trust the income of which is *distributable* periodically * * * and (c) an estate of a decedent before final settlement as to any income property paid or credited as such to a beneficiary, the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in his return his distributive share of the net income, even though not yet paid him" (article 345).

Note that in these regulations the language of paragraph 4 of subdivision (a) section 219, "income which is to be distributed," language which was identical in the 1916, 1917, 1918 and 1921 Acts is here paraphrased as

"income * * * distributable periodically." Note also that in the act the phrase "income which is to be distributed" is used as synonymous with the "beneficiary's distributive share of such net income" and that in the regulations the phrase "income * * * distributable periodically" is used as synonymous with "his distributive share of the net income." In this regulation, therefore, we find the word "distributable" which was later taken into subdivisions (b), (d) and (e) of the 1921 Act.

Note also that the regulation uses the phrase "income properly paid or credited as such to a beneficiary" found in subdivision (c) of both the 1918 and 1921 Acts as synonymous with "his distributive share of the net income" and, therefore, with the word "distributable."

We find, therefore, that the word "distributable" in the 1921 Act was taken from the regulations under the 1918 Act, that as there used it is equivalent to the phrase "to be distributed" and also to the phrase "*properly* paid or credited." Under these circumstances the word was written into the Act of 1921. Congress will be taken to have used the word in the same sense in which it was used in the regulations.

Brewster v. Gage, 280 U. S. 327.

The 1918 Act, with this regulation made under it, therefore, furnishes the genesis of all the significant parts of the provision in the Act of 1921 we are considering. The provision is:

> "The income of the estate or trust which, *pursuant to the instrument or order governing the distribution,*[1] *is distributable*[2] to each beneficiary *whether or not distributed*[3]."

The source of each of these three expressions is as follows:

1. "Pursuant to the instrument or order governing distribution" is generally equivalent to "pursuant to the terms of the will or deed creating the trust" as found in the first portion of section 219 (b) of the 1918 Act.

2. "Distributable" is found in article 345 of Regulations 45 issued under the 1918 Act.

3. "Whether or not distributed" is found in the latter portion of section 219 (b) of the 1918 Act.

Regulations 62, issued under the 1921 Act, contain provisions in identical language with those we quoted from Regulations 45. There is also Article 347 which applies subdivision (e) of Section 219, the new subdivision in the Revenue Act of 1921.

The parallel between the first and the second portions of Section 219 (b) of the Revenue Acts of 1918 and 1921 is very close. We have seen the pertinent language in the second portion of the subdivision as it appears in the 1921 Act is taken from the earlier portion as it appears in both the acts. These provisions have been construed by the Board of Tax Appeals.

In *McClung v. Commissioner,* 13 B. T. A. 335, there was a will leaving the residue to the university. The heirs contested. The university arranged a compromise with the heirs under which the will was admitted to probate, and the university agreed that the heirs should receive one-half of the residue. The Board held that it made no difference that only half of the residue ultimately went to the university. Under the will it should all have

gone to the university. The Board, therefore, allowed the deduction of the whole of the residue under the first portion of Section 219 (b). On the analogy of this decision a court, construing the second portion of Section 219 (b) of the 1921 Act, would say that although the amount was not actually *distributed,* nevertheless because it was *distributable* it was deductible by the trustee.

But the converse has also been held in regard to the deduction under the first portion of Section 219 (b).

In *Appeal of Estate of Tyler,* 9 B. T. A. 255, the executors had actually paid a certain portion of the income to the university. The Board held, however, that properly construed the will did not require this payment and, therefore, that it was not deductible. On the same analogy income *actually distributed* could not be deducted by the fiduciary if, as a matter of law, it was *not distributable.*

The same was held in *Heywood v. Commissioner,* 11 B. T. A. 29. The executor there made a payment to the Near East Relief, not because of any provision in the will, but because of a prior commitment of the testator. The Board held again that since the will did not direct the payment, the payment was not deductible.

These cases have been followed in construing Section 219 (c).

Sevier v. Commissioner, 14 B. T. A. 709, 717.

Petitioner repeats the suggestion he made at the oral argument that this section

> "which requires the inclusion in the income of the beneficiaries of such sums as are distributable

> whether distributed or not only requires recourse to the term 'distributable' where the amounts are not actually distributed'' (Pet. Rep. p. 8).

This is directly opposed to the position taken in petitioner's opening brief, where one of his main points was:

> ''The distribution of the income to life beneficiaries, including respondent's decedent, was controlled in fact and in law by the terms of the deed of trust [1] executed in 1889'' (Pet. Br. p. 16).

At the argument petitioner said he knew of no case supporting this suggestion. He now concedes

> ''the absence of any case presenting quite the same fact situation'' (Pet. Rep. p. 8),

but expresses the belief that his construction

> ''finds considerable support in certain cases referred to in our principal brief and at oral argument'' (Pet. Rep. p. 8).

He does not say what the cases are which he believes support this view, nor does he point out wherein he thinks they support his view. He does not question the demonstration we made at the oral argument and now repeat that the construction suggested by petitioner then and now is directly contrary to the two decisions in one of the cases he himself cites.

> *Fidelity & Columbia Trust Co. v. Lucas,* 52 F. (2d) 298, 1932 C. C. H., Vol. III, par. 9167 (Pet. Br. pp. 32-35; Res. Br. pp. 41-43).

In that case the court held that under the will the income was not properly distributable. It, therefore, disregarded

1. Will.

what the trustee actually did and held under the second portion of Section 219 (b) that the tax had to be based upon what was *distributable*. We pointed this out at the oral argument. Petitioner does not attempt to meet what we said there (Pet. Rep. p. 15). This is the precise situation which exists in the case at bar. The only difference between the two cases in this regard is that in the case cited the disregarding of the actual distributions and the taxing of the whole income to the trustee resulted in a higher tax than would have been paid if the tax had been levied in accordance with the actual distributions which were divided among several beneficiaries. In our case, owing to the fact that the trustee has distributed all the net income of the trust and, in addition thereto, the depreciation and the capital losses (R. 129-131), the trustee had no net income in the reduction of which either the capital losses or the depreciation could have been applied. If the Commissioner can succeed in taxing the beneficiaries upon the total amount of distributions, including the depreciation, leaving the trustee with the bare right to apply depreciation and capital losses in reduction of a nonexistent capital net income, the result will be that the family interested in this trust will be taxed upon a greater sum than the total net income of the trust (Res. Br. p. 56, *infra,* p. 39). In such a situation it is to the advantage of the government to look at the amount actually distributed, rather than at the amount distributable. In the *Fidelity* case it was to the advantage of the government to look at the amount distributable rather than the amount distributed. The fact, however, that in one case it is to the advantage of the government to construe the

statute one way and in another case another way does not mean that the courts will in every case disregard prior constructions and take the view most favorable to the United States. The language has a definite meaning and that meaning must be applied, whether it helps the tax gatherer or the taxpayer.

Petitioner departs from any question of construing this particular language and cites *Corliss v. Bowers,* 281 U. S. 376, 378, as supporting his statement

> "that what is subject to a man's unfettered command *is income to him*" (Pet. Rep. p. 8).

That is certainly not what Mr. Justice Holmes said in the case in question. What he said was:

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option *may be taxed to him* as his income" (p. 378).

The statement was made in sustaining the constitutionality of subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924 regarding income from revocable trusts. What the court held was that under the circumstances it was constitutional for Congress to impose this tax upon Corliss, even though the money was not actually his income. The court certainly did not say that the money was the income of Corliss. If the money actually had been the money of Corliss, of course Sections (g) and (h) of the Revenue Act of 1924 would have been unnecessary and the court would not have had to pass upon their constitutionality. In the *Corliss* case, while the money was not the taxpayer's income, nevertheless it was money to which he could legally obtain unquestioned title without any obligation to refund to anyone. That is, he

could make it his income. In our case, whatever the decedent got through the overpayments, it was simply a mistake and she was lawfully obligated at all times to rectify it.

Still avoiding discussion of the specific question of construction on which the court asked briefs, petitioner cites *Cleveland Railway Company v. Commissioner,* 36 F. (2d) 347 (Pet. Rep. p. 8). That case is quite different. The essence of it is that the court held that the "interest fund" to which the excess income was devoted was in fact and in law the property of the taxpayer. It was, said the court,

> "a reserve fund created to effectuate the purposes of petitioner's franchise, one of which was to pay to the stockholders a fixed annual return on their investment."

There was no obligation in that case to return the money. There was no question there of money paid under mistake.

Another case entirely extraneous to the construction of Section 219 upon which the court asked briefs is the next one cited, *Ford v. Commissioner,* 51 F. (2d) 206 (Pet. Rep. p. 8; Pet. Br. pp. 35-37; Res. Br. pp. 43-46). The case is analyzed fully in our earlier brief and distinguished at length (Res. Br. p. 46). Petitioner does not undertake in his reply to answer what we said about it there. It certainly has no bearing on the question of construction and we shall not detain the court with it further.

Another case cited by petitioner which has no relation whatever to the question of construction is *Lucas v. American Code Company,* 280 U. S. 445. It deals with a

matter of accrual and, therefore, can have no bearing upon the instant case which has to do with returns made on the cash basis. At any rate it cannot affect the construction of the express language of Section 219. It has nothing to do with any question of trusts. If it were applicable to the present situation and if the positive language of Section 219 were to be disregarded, then even if we could assume the actual amount distributed to the decedent in excess of the amount distributable to her in some way became income, nevertheless, immediately upon its receipt the obligation arose to refund it as money paid under mistake. The *American Code* case would have permitted respondent to deduct from the gross income the amount so refunded. This is within the express language of Mr. Justice Brandeis, who delivered the opinion of the court, saying:

> "Exception is made however, in the case of losses which are so reasonably certain in fact and ascertainable in amount as to justify their deduction" (p. 449).

He distinguishes carefully between such a case and the *American Code* case, which involved a mere unliquidated claim for breach of contract.

Petitioner refers to

> "the deduction of reserves to meet anticipated obligations" (Pet. Rep. p. 8),

instancing

> "bad debts" (note 5).

Of course, a bad debt is not an obligation of the creditor. The reserve which the creditor sets up is merely to take

care of a loss which he feels may or may not occur in the future. The decedent in the instant case had no such problem. Being charged with knowledge of the law, she is deemed to have known that the depreciation distributed to her but not distributable was refundable. It was not a question of a possibility; it was a present actual obligation.

Petitioner speaks of this money erroneously distributed as

> "actual income" (Pet. Rep. p. 8).

It is clear that money received under such circumstances cannot properly be denominated "actual income." Petitioner assumes an obligation on the part of taxpayers

> "to report as income cash which he has in fact received and retained for his own purposes during the taxable year" (Pet. Rep. pp. 8-9).

"Cash which he has in fact received and retained for his own purposes during the taxable year" must include gifts and borrowed money. The very purpose of borrowing money from a bank is to get money which the borrower may receive and retain for his own purposes. It does not follow that either gifts or borrowed moneys are income or returnable as such. The very idea of income involves the idea of

> "gains, profits, and income * * * salaries, wages or compensation for personal service * * * interest, rent, dividends."
>
> Revenue Act of 1921, Section 213 (a).

See also

> Revenue Act of 1913, Section II, subsection B,

and corresponding sections of the other income tax acts. Borrowed money, money received under a mistake and which is to be returned, is certainly not income.

Petitioner seems to urge his construction of the statute because

> "a departure from this sound policy would pave the way for grave abuses" (Pet. Rep. p. 9).

It is clear that there can be no abuses so long as the taxability of the individuals concerned is not made to depend, upon actual distributions which may be affected by the whim of the parties, by their mistake, as here, or by a desire so to adjust their affairs as to get the lowest tax rate, as may have been the situation in the *Fidelity and Columbia Trust Company* case, *supra,* pp. 29-30. When the amount of tax has to be computed upon the amount distributable in accordance with the legal rights of the parties, no room is left for chicanery. On the other hand, if the amount deductible by the trustee and taxable in the hands of the beneficiary can be increased beyond the amount actually distributable, merely by the parties themselves arranging illegal distributions of income, the result will be that whenever the parties find themselves in this situation the government can be deprived of its revenue. The only construction of Section 219 which could open the way to abuses is the very construction which the government now urges here.

No more pertinent to the specific question of statutory interpretation, about which the court asked the assistance of briefs, is petitioner's discussion of what we said about the injustice of the petitioner's demand here (Res. Br. p. 56). Petitioner's statement that

> "all applicable statutes of limitation have long since run" (Pet. Rep. p. 9),

is, of course, without foundation in the record. Probably what petitioner means is somewhat as follows: It is conceivable that a trust might exist in which there was both income periodically distributable to the beneficiaries and income which the trustee was obligated to accumulate. This is the kind of case that Section 219 (e) was designed to cover. Under that statute the trustee deducts the distributable income from his return and the beneficiaries return distributable income; both the trustee and the beneficiaries pay taxes. In such a case, if at the outset the trustee overstated the distributable income, he would pay at the outset a lower tax than the correct amount. The beneficiaries, on the other hand, would be assessed with more than the correct amount. If the government were to allow the statute of limitations to run on any additional assessment against the trustee, and thereafter the beneficiaries were to raise the question of the correct amount of income distributable, it might be inequitable for the beneficiaries to get their excessive tax refunded so long as the trustee did not pay the additional tax admittedly due from him. This apparently is the kind of case which the petitioner has in mind. There is nothing whatever in the record to intimate that any such inequity could exist here. No such inequity was pleaded in the answer (R. 29-31). There is no assignment of error that raises the point in any way (Res. Br. pp. 56-59). The record, indeed, shows exactly the opposite. The trust was not of the character to which Section 219 (e) is applicable. The trustee's account shows that the entire net

income was paid out to the various beneficiaries (R. 121, 122) during the year in question. There could never have been any income tax upon the trustee. The statute of limitations upon the trustee's income tax, therefore, is a matter absolutely immaterial. It could make no difference whether the record showed that the statute of limitations had run or not. However, in order to avoid any question that any inequity is sought in this case, we append a specific waiver by the trustee of the statute of limitations for the year here involved.

Petitioner says:

> "* * * the trustee was allowed precisely the amounts involved in this and associated cases as deductions in returning trust income" (Pet. Rep. p. 9).

If this means that these deductions were allowed in the return which the trustee made under the latter portion of Section 219 (b):

> "A statement of the income of the estate or trust which, pursuant to the instrument or order governing the distribution, is distributable to each beneficiary"

then the statement is correct. But petitioner apparently means that the deduction was made in computing

> "trust income upon which the trustee was taxable."

There is nothing in the record upon which any such statement could be based. The record shows clearly that the trustee had no undistributable income upon which he was taxable.

The effect of the decisions favorable to the United States, in *Roxburghe v. Burnet,* 58 F. (2d) 693 (Pet. Br.

p. 21, note; Pet. Rep. p. 12), is undoubtedly to work an injustice. If, in the *Roxburghe* case, the taxpayer had owned the buildings outright she would have been taxable only upon the total net income, that is, upon the net rents less the depreciation. The separation of legal and equitable interests due to the Roxburghe trust had the effect in that case of obligating the trustee to pay out all the rents to the taxpayer, without any deduction for depreciation. The essence of the Roxburghe decision is that the taxpayer, therefore, had to pay an income tax based upon the whole rents, without any deduction for the depreciation. The trustee, indeed, would have been permitted to deduct the depreciation from any undistributable income which the trustee had. The difficulty was, however, that in the *Roxburghe* case, as in the case at bar, all the net income was distributable and there was no net income to which the trustee could apply any depreciation deduction. This was an injustice. The injustice was apparent and was corrected by the Revenue Act of 1928 (Res. Br. pp. 32, 33). The injustice in the *Roxburghe* case which, as we say, was corrected by the Act of 1928, consisted in this, that the testator, thinking to protect and provide for his child by creating a trust, had really created a situation under which the income tax payable by the child was greater than if he had left her the property outright.

In our case, however, the injustice is even more apparent. The testator here was not guilty of the indiscretion of the testator in the *Roxburghe* case. His testamentary provisions were not such as to require the trustee to distribute the depreciation reserve in addition to the

whole net income of the trust (*supra,* pp. 2-18). If the trustee had followed the testamentary directions and the legal implications from them, he would have distributed only the net income after deducting depreciation, and the beneficiaries would have been obligated only to pay a tax upon what they received. The trustee, however, was ill-advised. He distributed more than the amount distributable; he paid out the depreciation reserve. When the error was discovered, it was remedied. In the meantime, however, and because of the trustee's error, the beneficiaries are asked to pay this tax, greater than the aggregate amount that would have been paid if there had been no trust, greater than the amount which would have been paid if the terms of the will had been obeyed.

Petitioner says:

> "The 'rank injustice' which respondent fears is simply the payment of a tax when it is due" (Pet. Rep. p. 9.

That is certainly not our contention. We agree, however, with the Congress that passed the Revenue Act of 1928 that it is injustice that a trust created for the benefit of a widow and children should so operate as to increase their taxes over what they would have been if the property had been left to them outright, and we repeat that it is rank injustice to attempt to impose such a tax where the trust itself was not such as to involve the beneficiaries in this technical legal difficulty, but where the mistaken acts of the trustee, in perfect good faith, are being seized on by the taxing authorities to create an additional tax burden on the beneficiaries.

Petitioner adds:

> "that if the income in question is not taxed as the result of this and associated proceedings, it will pass, tax free, a *gift by the Federal Government to citizens of a sister republic*" (Res. Rep. p. 9).

One error is apparent in this statement. These particular excess payments of undistributable funds were not income, never have been income and are not income now. They were simply payments made by mistake out of the capital of the trust fund. In no event, however, can it be said that such funds are "a gift by the Federal Government." The maker of this gift was the testator, "Adolphus Carter Whitcomb, of the City and County of San Francisco, State of California, United States of America" (R. 75). He set apart the capital of this trust fund for the benefit of his widow and children. The trustee, in good faith, thought he was following the testator's directions in making these payments. This was a mistake. It operated to the detriment of the remaindermen; they objected, and the mistake has been rectified. In any event, however, there is here no "gift by the Federal Government."

Petitioner cites *United States v. Sullivan,* 274 U. S. 259, as refuting

> "Any suggestion that money illegally distributed is for that reason not subject to income taxation" (Pet. Rep. p. 9).

The *Sullivan* case merely held that a bootlegger had to pay income tax on his ill-gotten gains. A bootlegger's profits, of course, are income, entirely apart from the illegal nature of the consideration by which he earns them.

The whole intent of the transaction between him and his customers is that he shall keep his earnings. Essentially, they are earnings just as much as the emoluments of a lawful trader. In our case, however, there is no illegality in the transaction by which the improper distributions were made by the trustee to the beneficiaries. It was simply a mistake. The law requires that the money be returned in order to correct the mistake. It is not illegality in the sense of moral taint which requires the return of the money. It is simply the fact of payment under mistake.

Petitioner now claims (Pet. Rep. p. 9) that the group of decisions theretofore cited by him (Pet. Br. pp. 20, 21, note) sustain the construction of Section 219 which he suggested at the oral argument. The court will remember that when he suggested this construction, the court asked him whether he knew of any authority sustaining it, and he replied then in the negative. His present contention that the cases then in his brief sustained this construction is clearly an afterthought. His detailed analysis of the various cases (Pet. Rep. pp. 9-12) does not show that any one of them sustains the suggested construction. His statement at the oral argument that he knew of no authorities in support of that construction was correct. His present claim in regard to these authorities is incorrect.

Baltzell v. Mitchell, 3 F. (2d) 428 (Pet. Br. pp. 19-21, note; Pet. Rep. pp. 9, 10), and its companion case, *Baltzell v. Casey,* 1 F. (2d) 29 (Pet. Rep. pp. 9, 10), certainly are no authority for petitioner's suggested construction of Section 219 of the Revenue Act of 1921. The Revenue Act of 1921 was not involved. It is true that Section 219 of

the Revenue Act of 1918 was applied. In this application, however, there was no suggestion that the beneficiary was taxable for anything more than the amount of income *distributable* to him in accordance with the terms of the trust. In that case the trustee had suffered certain capital losses by the sale of securities. These were similar to the losses which were the subject of the second portion of the remaindermen's objections to the trustee's account here (R. 131; Res. Br. pp. 29, 30). The decision of the Federal Court in the *Baltzell* case was the same as that of the State Court in this case, that is, that the income of the beneficiaries of the trust could not be decreased by reason of these capital losses, and, therefore, that they could not be deducted in ascertaining the amount *distributable*. The case has nothing to do with any question of depreciation or with petitioner's suggestion as to the construction of Section 219 of the Revenue Act of 1921. It has no bearing upon either of the points upon which this court asked the parties to file briefs.

Codman v. Miles, 28 F. (2d) 823 (Pet. Br. pp. 20, 21, note; Pet. Rep. p. 10), is also beside the point. That case involved no question of depreciation of the trust or even losses of the trustee. This appears from the passage which petitioner quotes:

> "There is no destruction or diminution by use of the property which furnishes the source of the income" (Pet. Rep. p. 10).

What the taxpayer was claiming was that as the end of her equitable life estate approached, the value of that estate diminished. She was seeking to deduct from her distributable income under the trust an allowance for

depreciation of her equitable life estate. Very clearly, the case has no bearing upon either of the points on which the court has asked for briefs here. It has nothing to do with the question whether a trustee shall or shall not maintain a reserve to cover depreciation. It has nothing to do with the question whether under Section 219 of the Revenue Act of 1921, a beneficiary is to be taxed with income distributed to him in excess of the amount properly distributable.

Abell v. Tait, 30 F. (2d) 54 (Pet. Br. pp. 20, 21, note; Pet. Rep. pp. 10, 11), is also of no value here. It resembled *Baltzell v. Mitchell,* (*supra,* p. 41), in that it concerned the effect of capital losses on the part of the trustee. It reached the same result. It involved the Revenue Act of 1918 as distinguished from that of 1921. It has nothing to do with either of the questions on which this court has asked for briefs. It certainly does not pass in any way upon the question of maintenance by a trustee of a reserve for depreciation. Equally clearly, it does not pass upon petitioner's suggested construction of Section 219 of the Revenue Act of 1921.

Kaufmann v. Commissioner, 44 F. (2d) 144 (Pet. Br. pp. 20, 21, note; Pet. Rep. p. 11), is also foreign to the issues of this case and the two points upon which the court has asked for briefs. In that case the testator devised a legal life estate to his widow. There was no trust. The widow gave certain of the property to her sons. Much of the case is devoted to a discussion as to whether this gift was effectual. That discussion, of course, has nothing to do with the case at bar. Among the assets were four buildings; two stood in the name of taxpayer's sons,

a third stood in the name of the executors, and the fourth was in the taxpayer's own name. The taxpayer claimed the right to deduct depreciation on all four of them. As to the first three, this claim was based in some way upon Section 219 (d) of the 1918 and 1921 Acts. The court did not sustain the claim, but held that as between life tenant and remaindermen, depreciation was the loss of the remaindermen. As to the fourth property, the court held the taxpayer was entitled to depreciation except for the fact that she failed in proof of value. There is nothing in the case relating to the duties of a trustee in regard to the maintenance of a depreciation reserve. There is nothing in the case supporting any such construction of Section 219 of the Revenue Act of 1921 as that for which petitioner now contends.

Hubbell v. Burnet, 46 F. (2d) 446 (Pet. Br. pp. 20, 21, note; Pet. Rep. p. 11), is also beside the point. A trust was created by deed. The trustee actually set up a depreciation reserve and withheld that amount from the beneficiaries. The court quoted Section 219 (d) of the Revenue Act of 1921, and held that the beneficiaries were taxable, not merely upon the amount *distributed,* but upon the amount *distributable.* The case does hold that, under the particular provisions of the very elaborate trust deed there involved, the trustee was not authorized to maintain a depreciation reserve. It does not deal with the general proposition in this connection on which the court asked for briefs; that is, whether, in the absence of specific directions, the duty to maintain a depreciation reserve will be implied where a trustee, under a residuary trust, makes a purchase of depreciable property. We

submit that this case does not sustain petitioner's claim on either of the points to which these reply briefs are directed.

Codman v. Commissioner, 50 F. (2d) 763 (Pet. Br. pp. 20-21, note; Pet. Rep. pp. 11-12), arose out of the same transaction as *Codman v. Miles* (*supra,* p. 42). The same points there decided were reaffirmed. As we have seen, they have nothing to do with either of the points on which this court requested these briefs. This last decision did go further. In doing so, however, it discussed in no way the construction of Section 219 of the Revenue Act of 1921, for which petitioner cites it here. There is some discussion of the terms of the trust agreement and the court holds that under it no depreciation reserve was required. It has no bearing upon the question of testamentary construction involved in the case at bar (*supra,* pp. 2-18).

Roxburghe v. Burnet, 58 F. (2d) 693, and *Roxburghe v. The United States,* 64 Ct. Cls. 223, (*supra,* p. 37; Pet. Br. pp. 20-21, note; Pet Rep. p. 15), are also distinct. The cases arose under the Revenue Act of 1918 and could not assist in the construction of Section 219 of the Revenue Act of 1921, in connection with which it is cited here. The Court of Claims, however, construed the 1918 Act just as we now insist the corresponding provisions of the 1921 Act should be construed:

> "Subsection (b) of section 219 in providing for an additional deduction in computing the net income of the estate or trust refers to 'the will or deed creating the trust,' showing that reference must be had to the instrument creating the trust in ascertaining

> the distributive share thereunder. * * * The statute does not attempt to enlarge this interest or increase her distributive share. The amount of it is not in dispute'' (p. 228).

The decision of the Court of Appeals is quite similar. So far, therefore, as the construction of Section 219 is concerned, the case cannot sustain petitioner's claim; like the cases we have cited, it holds definitely that the test is the amount *distributable.* On the question as to whether the trustee was obliged to maintain a depreciation reserve, what the amount distributable was, the case can be no authority whatsoever because, as we have seen ''the amount of it is not in dispute.'' The very issue which exists here (*supra,* pp. 2-18) as to the duty of the trustee was not raised at all in the *Roxburghe* case.

To the same effect petitioner cites

> *Crilly v. Commissioner,* 15 B. T. A. 642 (Pet. Rep. p. 12, note).

In that case the trustee distributed the depreciation reserve. The propriety of this distribution was not questioned or presented in any way. The Board neither passed upon the question of the construction of Section 219 of the Revenue Act of 1921, for which petitioner cites the case here, nor upon the question as to the duty of the trustee to maintain a depreciation reserve, the other point upon which this court requested briefs. The case has no bearing whatever on the case at bar, except for the fact that the opinion is by Mr. Marquette, who wrote the majority opinion below (R. 42-49) and evidently did not think there was any inconsistency in that opinion and what he said before in the *Crilly* case.

In the same note petitioner cites

Detroit Trust Co. v. Commissioner, 16 B. T. A. 207.

The case raises no question of depreciation or of the construction of Section 219 of the Revenue Act of 1921, in which connection petitioner cites it. The only question passed upon is that of the right of an equitable life tenant of a mining property to claim a deduction for depletion. The decision is based upon the *Fleming, Merle-Smith* and *Fowler* cases, 6 B. T. A. 900, 11 B. T. A. 254 and 11 B. T. A. 265. These cases have been reversed by the Circuit Courts of Appeal.

Merle-Smith v. Commissioner, 42 F. (2d) 837;

Fleming v. Commissioner, 50 F. (2d) 1075.

See also

Merle-Smith v. Commissioner, 22 B. T. A. 378.

The Detroit case is simply wrong.

Goff v. Commissioner, 18 B. T. A. 283 (Pet. Rep. p. 12, note), is another depletion case. It also is based upon the *Fleming, Merle-Smith* and *Fowler* cases, subsequently reversed (*supra*), and upon the *Detroit Trust* case (*supra*). It is also wrong. It does not deal in any way either with the question of depreciation or with the question of the construction of Section 219 of the Revenue Act of 1921, for which petitioner cites it here.

White v. Commissioner, 23 B. T. A. 391 (Pet. Rep. p. 12, note), is the same case as that in which we cited the subsequent opinion, *White v. Commissioner,* 25 B. T. A. 243 (Res. Br. p. 53). It sustains everything we have said on either of the two points on which the court has asked briefs. That case related to trusts under a residuary

clause. Part of the trust assets were leaseholds. The trustees amortized the value of the leases over their remaining life, and submitted their accounts to the Surrogate's Court. The Surrogate's Court approved their accounts, including the provision for amortization. The Commissioner sought to increase the taxable income of the beneficiaries, by adding the amount of this amortization. Both in the earlier opinion, which petitioner now cites, and in the later opinion the Board cited Section 219 of the Revenue Act of 1921 and held that the controlling thing was the amount distributable, rather than the amount actually distributed (23 B. T. A. 397; 25 B. T. A. 249). In the earlier decision, which is the one petitioner now cites, the Board concluded that under the terms of the trusts and certain New York decisions, which it cited, the amortization deduction was improper. It refused to follow the order of the Surrogate's Court,

> "since it does not appear that an issue was raised as to the correctness of the trustees' action" (23 B. T. A. 400).

This result was directly contrary to the later decision of the Board, upon which we have relied. In the later decision the Board held the amortization deduction properly made and overruled the Commissioner's contentions. The Board seemed to regard the decision of the Surrogate's Court as binding on it (Res. Br. p. 53). At any rate, it held that the local law was applicable, and followed the local law regarding leaseholds, citing particularly *In re Golding,* 216 N. Y. S. 593, one of the cases upon which we relied in regard to leaseholds (Res. Br. p. 14).

At the argument petitioner apologized for having cited a decision of a Cicuit Court of Appeals which had since been reversed by the Supreme Court of the United States (Res. Br. p. 47). We are quite sure, therefore, that if he had an opportunity he would apologize for having thus cited an opinion of the Board, which the Board itself had repudiated in an opinion to which we had already called the court's attention (Res. Br. p. 53). There is nothing, of course, in either of the opinions in this case which sustains, in any way, the construction of Section 219 of the Revenue Act of 1921, suggested by petitioner in support of which petitioner cited it.

Falk, et al., Executors v. Commissioner, 24 B. T. A. 299 (Pet. Rep. p. 12, note), is another depletion case. It deals in no way either with the construction of Section 219 of the Revenue Act of 1921, for which petitioner cites it, or with the matter of depreciation, on which the court also asked for briefs. It relies upon the *Detroit Trust* case (*supra,* p. 47), the *Goff* case (*supra,* p. 47), and the first decision of the Board in the *White* case (*supra,* p. 47). It recognizes that the *Merle-Smith* and *Fowler* cases (*supra,* p. 47) had been overruled, but feels in some way that the decision overruling them is to be distinguished because of something said in the first *White* case (*supra,* p. 47). Petitioner advises that the case is pending in the Circuit Court of Appeals (Pet. Rep. p. 12, note). At any rate, it need not detain us as it is no authority for any point in which we are now interested.

We submit, therefore, that petitioner has produced no authority.

3. THERE IS NOTHING IN THE MISCELLANEOUS POINTS DISCUSSED BY PETITIONER.

Renewing his contention that the question is one for the application of federal law rather than state law (Pet. Rep. pp. 12, 13), the petitioner questions

> "just where respondent stands upon this proposition" (Pet. Rep. p. 13, note).

It can do no harm to repeat. The rights of the parties under the Whitcomb will are, of course, determined by the law of California (Res. Br. pp. 35, 36), by whose courts alone their rights are enforceable (Res. Br. pp. 38, 39). On the essential point, however, the duty of a trustee in cases of this kind to maintain a depreciation reserve, the federal law is the same as the California law (*supra,* p. 17; Res. Br. p. 27). Petitioner has never shown that the federal law was any different from the state law (Res. Br. p. 60; *supra,* p. 17). We have, therefore, said that for practical purposes petitioner's claim that the federal law governs "*may* well be granted." By this we mean just what we say; not that we do grant any such claim, because we know the contrary.

Petitioner characterizes as a suggestion, rather than a contention (Pet. Rep. p. 13) our position in this case as to the conclusiveness of the supposed federal law about this "*testamentary* trust of *real property*" (Res. Br. p. 35). That our position is fully supported, even by the authorities upon which petitioner relies, is made clear by the consideration that the passages which we have quoted from those authorities are taken from the quotations made from them in petitioner's own brief (Res. Br. p. 35). The administration of the federal income tax nearly

always requires a consideration of the local laws. No one except a federal employee or contractor can earn any income without being dependent in some way upon local law. In applying the federal tax we must consider what substantive rights and obligations have arisen under the local law. Having ascertained those rights and obligations we must then consider the federal law in order to determine whether or not creation of these rights and obligations has resulted in that which the federal law regards as taxable income. The community property income tax cases were instanced, as example of the extent to which local laws must be examined in applying the federal income tax (Res. Br. p. 36). Another instance is the recent decision of this court in *Commissioner v. Caroline E. Burke, et al.,* decided November 28, 1932.

In this connection, petitioner refers to *Burnet v. Harmel,* decided by the Supreme Court of the United States November 7, 1932 (Pet. Rep. p. 14), as an authority against what we have said. The case illustrates very pointedly just what we have said. The necessity of looking to the state law in order to determine the nature of the rights and obligations of the parties to an oil lease, such as involved in that case, was the very thing determined by *Group No. 1 Oil Corporation v. Bass,* 283 U. S. 279 (Res. Br. p. 36). The *Harmel* case takes pains to recognize the correctness of the *Group No. 1* case. All the *Harmel* case does is, after having ascertained the parties' rights and obligations under the state law, to apply the conceptions of the federal income tax law to those rights and obligations in order to determine the amount and incidents of the tax.

> "The State law" says Mr. Justice Stone, "creates legal interests but the Federal statute determines when and how they shall be taxed."

We have already cited (*supra,* p. 16) an early ruling of the Commissioner which lays down just this distinction and correctly points out the necessity of considering the local law and the extent to which the local law shall be considered. The Commissioner pointed out that in trusts, gains from the sale of capital assets are considered income for income tax purposes, but frequently are not considered income by the state courts for the purpose of apportioning income and principal between life tenants and remaindermen. On the question of taxability he said:

> "As to this, however, the Federal statute and not the rule of probate law must govern. Decisions as to income and capital in other fields of law are not necessarily followed for income tax purposes. * * * The decisions of the local courts, however, as to the distribution of such items of income are important. They determine by whom the income should be accounted for. This makes it necessary that the distributable income be treated under class (4) and the capital gain or stock dividend under class (3) of section 219 (a)" (O. 1013, 2 C. B. 181, 183, 184).

Petitioner repeats (Pet. Rep. p. 14) his charge that the decree of the probate court was "a consent judgment." All we can do is to repeat what we have said (Res. Br. pp. 28-29, *supra,* p. 14) that there is nothing whatever in the record to support the statement that the order was obtained by consent.

In regard to the binding effect of the state court's decree petitioner attempts to distinguish *Uterhart v. United States,* 240 U. S. 598 (Res. Br. pp. 46, 55, 59; Pet. Rep. p. 14). As we understand this paragraph, the only distinction that we can see that petitioner suggests is that in the *Uterhart* case it was

> "very properly admitted by the Government that the New York decree is in this proceeding binding with respect to the meaning and effect of the will" (p. 603).

The court's emphatic statement as to the propriety of this admission was supported by its argument:

> "The right to succeed to the property of the decedent depends upon and is regulated by state law (*Knowlton v. Moore,* 178 U. S. 41, 57), and it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees" (p. 603).

The only distinction that can be suggested is that in the *Utterhart* case the government *very properly admitted* the binding effect of the state decision, while in this case the government quite *improperly seeks to reject* the state court decision.

Still attacking the decision of the probate court, petitioner repeats the citation of *Fidelity & Columbia Trust Co. v. Lucas,* 52 F. (2d) 298, and *Ford v. Commissioner,* 51 F. (2d) 206 (Pet. Br. pp. 32-37; Res. Br. pp. 41-46; Pet. Rep. pp. 14-15). As petitioner makes no further argument in support of the citation of these cases, and

does not attempt to meet what we have said, there is no occasion for us to say more.

As a new authority on the same point, petitioner cites *Jackson v. Smietanka,* 272 Fed. 970 (Pet. Rep. p. 15). There is no doubt that the particular fee of $100,000 there in controversy was received by the taxpayer in 1918, and that when received it was received as compensation for personal services. There never was any claim by any party that the taxpayer was under obligations to refund the money. His only argument was that the money was income for years other than those in which it was received. The only support for this argument was an *ex parte nunc pro tunc* order. Contrast that case with the case at bar. In the *Jackson* case the order adjudicated no rights in controversy between any parties, since its only effect was to purport to allocate the compensation from one year to another. In the *Whitcomb* case the order adjudicated matters seriously in controversy between the parties and resulted in a judgment requiring the ultimate payment of over $600,000. In the *Jackson* case the petition was heard *ex parte.* In the *Whitcomb* case the question was submitted in the ordinary way after having been actively litigated between the parties at interest.

Petitioner attempts to distinguish *McCaughn v. Girard Trust Co.,* 19 F. (2d) 218 (Res. Br. pp. 47-50, 55; Pet. Rep. pp. 15-16). Apparently, petitioner concedes that the distinction is "practical" and not "legal." The ground suggested is that "obviously the distribution under an invalid will would pass no sort of title" (Pet. Rep. p. 16). So also here the distribution of money, which distribution

was not authorized in any way by the will, could pass no sort of title.

There is no attempt to distinguish any of the other cases cited by us on this question of the effect of the decree of the probate court (Res. Br. pp. 47-53, 54-56). The situation with regard to this order is very simple. As we have shown (*supra,* p. 52), federal income tax is based upon the application of federal laws to the rights and obligations conferred upon parties by state laws. While, so far as the federal government is concerned, proceedings between citizens in the state courts are *res inter alios acta* and not binding upon the federal government by any sort of doctrine of *res judicata,* nevertheless, those judgments do give rise to rights and obligations, upon the creation of which the federal income tax becomes due. The income tax cannot be computed without considering these extraneous facts. For example, a corporation operates a motor vehicle in the course of its business. The motor vehicle collides with a pedestrian. The pedestrian sues, alleging negligence, and gets a judgment. The corporation pays the judgment. The corporation deducts the payment as a business expense on its income tax return. Quite truly, the judgment is *res inter alios acta* so far as the United States is concerned; quite truly, it is not binding upon the United States in the sense of *res judicata;* nevertheless, the nature and character of the payment made by the corporation cannot be ascertained without looking at the judgment. The nature and character of the payment being ascertained, it remains a federal question whether such payment is a deductible expense. Before that federal question can arise, however,

the judgment must be considered and must be given full credit.

Apparently the portion of the reply in which *Lewis v. Reynolds,* 284 U. S. 281 (Pet. Rep. p. 16) is cited is intended to pursue the same argument we have already discussed as to the possibility of some claim of the United States for additional taxes from the trustee having been barred by the statute of limitations (Pet. Rep. Br. p. 9; *supra,* pp. 35-36). Petitioner is mistaken in citing the case as authorizing the government to "set off taxes actually due against the amount of the refund claimed" (Pet. Rep. p. 16). The sense of the decision is that for each income tax year there is one tax for each taxpayer; that the taxpayer cannot assert a claim for refund without requiring an entire recomputation of the tax for that year; that if such recomputation shows that, owing to another error different from that upon which the refund claim is based, an error which had favored the taxpayer rather than the government, the tax originally paid had in fact been less than the correct tax due from the taxpayer, then no refund could be obtained. The principle is quite different from that of set-off. At any rate, it has no bearing on the case at bar. The only error in regard to the computation of any tax which is before the court in this case is that due to the insistence of the petitioner upon the addition to decedent's income of the amount of the depreciation reserve. At no time has it been alleged that there was any error in the computation of the trustee's tax. The record shows that everything which the trustee received was distributed to the beneficiaries (R. 121-122, *supra,* p. 30); that there could not have been a tax upon

the trustee. The whole suggestion is foreign to the facts of this case and to the record before the court and to the two specific questions upon which the court asked briefs.

Finally, petitioner cites *Woolford Realty Co. v. Rose,* 286 U. S. 319, 330 (Pet. Rep. p. 16). That case has nothing to do with either of the two questions upon which the court asked briefs here. Petitioner cites it merely as authorizing the decision of tax cases upon some ground of expediency. What Cardozo, J. said there was that tax statutes are not to be construed in such a way as to give results obviously inexpedient. Petitioner has not shown any particular question of expediency involved in the instant case. It is, of course, expedient that the government derive revenue from taxes, but it is vastly more expedient that the courts and administrative officials administer tax laws justly and in accordance with their provisions and the rights of the parties. This, therefore, cannot be what petitioner means. The only matter of construction to which the remark of Cardozo, J. could be applicable is that regarding Section 219 of the Revenue Act of 1921, upon which this court asked briefs. We have shown that the construction for which petitioner contends would have one inexpedient result; it would permit taxpayers, who were parties to testamentary trusts, to make distributions of income in violation of the trust provisions and thereby reduce their income taxes (*supra,* p. 35). Any argument on the ground of expediency, therefore, must turn against petitioner.

Petitioner's last sentence imputes to respondent a desire "to escape taxation * * * by pursuing a particular course of conduct an indefinite number of years

later'' (Pet. Rep. p. 16). This misconceives the entire case. Our argument is that, not because of any conduct on the part of ourselves or any other parties, the rights and obligations of the parties to the Whitcomb trust were fixed in the last century when that will was made and the estate distributed to the trustees. The fire of 1906, some fifteen years before the period here in controversy, necessitated certain changes in the administration of the trust which gave rise to investments in depreciable property and created the obligation on the part of the trustee to maintain a depreciation reserve. That obligation was recognized by the Board of Tax Appeals in fixing the amount of the tax here. Nothing done by any one at any subsequent time could, or did, affect in any way either the rights of the parties in regard to the income from 1921, or the amount of tax due from them on account of the receipt of that income.

III. SUMMARY.

In this case there are no questions of fact. It must turn on two propositions of law. The first proposition is that under Section 219 of the Revenue Act of 1921, respondent's decedent was taxable upon the amount of the trust income *distributable* to her during the fractional year involved (Res. Br. pp. 3-6; *supra,* pp. 18-49). The second proposition of law is that where, as here, a trustee under a residuary devise or bequest invests in wasting assets, the amount of income distributable to the beneficiaries is subject to a proper deduction for amortization (Res. Br. pp. 6-25; *supra,* pp. 2-18).

The first of these points was apparently conceded in petitioner's opening brief (*supra,* p. 29). It was only at the oral argument that, as an entirely new proposition, he suggested the construction for which he contends now.

The second of these propositions was entirely ignored in petitioner's opening brief (Res. Br. p. 25).

At the oral argument the court asked petitioner whether he knew of any authorities in support of the positions then and now taken by him on these two propositions. He was given leave to cover the two points in a reply brief. He certainly did not say then that the cases already cited in his opening brief were thought by him to sustain the positions he was taking on these two propositions. Pursuant to the leave of the court he has filed a reply brief. A quarter of it (Pet. Rep. pp. 12-16; *supra,* pp. 50-58) is frankly devoted to questions other than the two on which briefs were directed. While included under captions of the two questions upon which the court asked for briefs, more than half the rest (Pet. Rep. pp. 3-6; *supra,* pp. 9-17; Pet. Rep. pp. 8-12; *supra,* pp. 31-49), has manifestly no relation whatever to the captions under which it stands. Petitioner has not offered any single new authority tending to sustain his position on either of these two questions. On both of these two questions he relies upon a group of cases cited in his opening brief. In view of what he said at the oral argument, his present claim that these cases sustain his positions on these two points is clearly an afterthought (*supra,* pp. 18, 41). That the cases in question do not sustain his position on either of these two points is shown by the analysis we have made of them (*supra,* pp. 41-46).

On these two points, however, we respectfully submit that the demonstration made in our brief is sound (Pet. Br. pp. 3-25), that the authorities there cited support fully what we have said and that the discussion at the oral argument and in these reply briefs only confirms the soundness of the position originally taken.

Dated, San Francisco, California,
December 28, 1932.

Respectfully submitted,

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Felix T. Smith,
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Pillsbury, Madison & Sutro,
Of Counsel.

ASSESSMENT OF INCOME AND PROFITS TAX

December 29, 1932.

In pursuance of the provisions of existing Internal Revenue Laws James Otis, Trustee under the Will of A. C. Whitcomb, deceased, a taxpayer of 310 California Street, San Francisco, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer for the taxable year (or years) 1921, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1934, except that, if a notice of a deficiency in tax is sent to said taxpayer by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

James Otis,
Trustee under the Will of
A. C. Whitcomb, deceased,
Taxpayer.

[SEAL*]

By_____

_____
Commissioner.

By_____ _____
(Date)

*If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

U. S. GOVERNMENT PRINTING OFFICE. 1933 2—13790

No. 6835

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF LOUISE P. V. WHITCOMB, DECEASED, RESPONDENT

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR PETITIONER

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6835

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN FREULER, ADMINISTRATOR OF THE ESTATE OF Louise P. V. Whitcomb, Deceased, respondent

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR PETITIONER

PREVIOUS OPINION

The only previous opinion in the present case is that of the Board of Tax Appeals (R. 42–53), which is reported in 22 B. T. A. 118.

JURISDICTION

This appeal involves income tax for the period from January 1 to June 14, 1921, in the amount of $723.60 (R. 9) and is taken from a decision of the Board of Tax Appeals entered June 25, 1931 (R. 54). The case is brought to this Court by petition for review filed December 22, 1931 (R. 55–60), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110.

There are two other causes pending upon petitions for review, Nos. 6833 and 6834, upon the docket of this Court, which pertain to deficiencies in income tax for the calendar years 1922 to 1925, inclusive, and for the period from June 14 to December 31, 1921, respectively, but by stipulation of counsel and with the consent of the Court the records in Nos. 6833 and 6834 have not been printed and the Court is asked to dispose of these cases in the same manner as No. 6835.

QUESTION PRESENTED

Where a life beneficiary of a trust receives her full share of the accruing income, undiminished on account of any depreciation reserve, which income is properly taxable to her when received, may the taxable status of said income be retroactively changed by an order entered in a friendly settlement of the trustee's account before a state court some years later, in pursuance of which a small unidentified portion of the said income is repaid to the trustee?

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected

by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits, in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 219. (b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or

trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year.

Section 219 (b) (2) of the Revenue Act of 1926, c. 27, 44 Stat. 9, reenacts verbatim the corresponding subsection of the Revenue Act of 1924.

STATEMENT OF FACTS

The findings of fact of the Board of Tax Appeals (R. 34–42) may be restated for present purposes as follows:

Louise P. V. Whitcomb was from sometime in 1889 until her death on June 14, 1921, the widow of A. C. Whitcomb, deceased. Charlotte A. W. Lepic is the daughter of the said A. C. Whitcomb, deceased. Marguerite T. Whitcomb, Louise A.

Whitcomb, and Lydia L. Whitcomb are the widow and two children of Adolph Whitcomb, deceased, who was the son of A. C. Whitcomb, deceased.

The said A. C. Whitcomb died in the year 1889, a resident of the State of California, leaving a last will and testament which was duly admitted to probate and record by the Superior Court of the State of California, in and for the City and County of San Francisco. Said last will and testament provided, among other things, as follows:

> 7th. I give to my hereinafter named Executor, Jerome Lincoln, of said San Francisco, all the rest of my property, real, personal or mixed, except what I may have in France, of every kind and nature and not hereinbefore disposed of, after the payment of my debts, in Trust, nevertheless, to pay over to my said wife, Louise Palmyre Vion Whitcomb, one-third part of the interest thereon or income therefrom, for and during her natural life, and the other two-thirds parts to my two children, born of her; one, Adolph, born on or about the 23rd day of February, 1880, and the other, Charlotte Andree, born on or about the 4th day of December, 1882, with the reversion or remainder of the whole three-thirds parts to the descendants "per stirpes" of the said two children, if any be alive at the time of the death of the said two children; and if none be alive at that time, to Harvard College, in conformity with the provisions named or indicated in Section

Six (6) of this Will, having reference to said Harvard College.

The said will contained no directions in regard to the manner in which the income from the trust should be computed, accounts kept, or depreciation provided for.

James Otis was appointed a trustee of said trust on February 23, 1896. He has acted as such trustee continuously since that date, and since the year 1905 he has been the sole trustee of said trust.

The original trust estate consisted largely of cash, bonds, stocks, and notes. On February 23, 1906, the trust estate consisted of bonds, corporate stocks, cash, and promissory notes secured by mortgages, of a total value of more than $3,000,000, and certain parcels of real estate, most of which were in San Francisco. On April 18, 1906, the San Francisco earthquake and fire occurred. All of the improvements on the San Francisco real estate owned by the trust were destroyed by the fire, including those on the large parcel at Eighth and Market Streets, which the trust still owns and on which the Hotel Whitcomb now stands. Some time after the San Francisco fire the trustee of the said trust adopted the policy of improving the real estate owned by the trust and of converting the other assets of the estate to accomplish that purpose. As a result of said policy and of the acquisition of additional parcels of real estate, the assets of the trust for several years prior to 1921, and during

the years 1921 to 1926, inclusive, consisted almost entirely of improved real estate, including the Whitcomb Hotel and its furniture and equipment. The last item represented an investment of more than $2,000,000.

During the years 1921 to 1926, inclusive, the trust estate suffered exhaustion, wear and tear, as follows:

1921	$43,003.16	1924	$39,258.00
1922	39,408.00	1925	39,108.00
1923	39,408.00	1926	55,833.00

The trustee or trustees of said trust made payments of the income from the trust in equal shares to the widow and two children of A. C. Whitcomb, until the death of his son Adolph, which occurred on September 5, 1914. The testator's widow, Louise P. V. Whitcomb, died on June 14, 1921. During the years 1921 to 1926, inclusive, the income from said estate was paid as follows:

1921. ⅓ to Louise P. V. Whitcomb until her death on June 14, 1921, and thereafter ⅛ to her estate;
⅓ to Charlotte A. W. Lepic until June 14, 1921, and thereafter ⅛;
⅓ to the widow and two children of Adolph Whitcomb, namely Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb, until June 14, 1921, and thereafter ⅛;

1922, 1923, 1924, and 1925. ⅛ to the estate of testator's widow, Louise P. V. Whitcomb;
⅛ to the testator's daughter, Charlotte W. Lepic;
⅛ to the widow and two children of the testator's son, namely Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb.

1926. ½ to testator's daughter, Charlotte A. W. Lepic;
½ to the widow and two children of the testator's son, namely, Marguerite T. Whitcomb, Lydia L. Whitcomb, and Louise A. F. E. Whitcomb.

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The trustee of said trust filed fiduciary returns for the years 1921 to 1926, inclusive, and deducted in computing the net income of the trust for each year the respective amounts above set forth, representing exhaustion, wear and tear sustained by the trust. The trustee, however, did not withhold from the beneficiaries to whom income payments were being made the amounts represented in the depreciation deduction, and each of said beneficiaries received her ratable share thereof during the years involved herein, as well as in preceding years.

From 1903 to 1928, inclusive, the trustee or trustees of said trust presented an annual account to the beneficiaries entitled to income payments, but did not file any account in the Superior Court of California, which has jurisdiction over the trust until its termination for the settlement of accounts and for other purposes.

On September 5, 1928, James Otis, as trustee of said trust, filed with the Superior Court in San Francisco his account accompanied by a petition for its allowance. The account covered the period from February 23, 1903, to February 23, 1928, and it set out all of the payments made to the beneficiaries of said trust during that period.

The allowance and approval of said account was opposed by Napoleon Charles Louis Lepic and Charlotte de Rochechouart, children of Charlotte A. W. Lepic, one of the beneficiaries herein, who are two of the remaindermen entitled to part of

the corpus of the trust upon the termination thereof, if they be then living. In their objections, which were duly filed with the Superior Court of the State of California, in and for the City and County of San Francisco, they allege that the trust property had sustained depreciation during the years 1913 to 1927, inclusive, in the amount of $622,434.11; that no reserve or other provision for such depreciation had been made from the gross income of the trust estate; that said amount of $622,434.11 had been paid by the trustee to the beneficiaries of the trust entitled to the income therefrom, as income, thus impairing the trust property by that amount, and they prayed that the trustee be charged with that amount. All of the parties interested in said trust estate, including Harvard College, were notified of the filing of said account of said trustee, and of said objections, and were represented by counsel at the hearing held thereon. On September 19, 1928, the Superior Court of the State of California, in and for the City and County of San Francisco, entered two orders, one original and the other an amending order, settling the trustee's account. These orders are set forth in full at pages 136 to 144 of the record. In substance they sustain the objections of the two remaindermen and decree the overpayment of the amounts claimed to have been erroneously distributed as income in the several years from 1913 to 1927. The first order directs the payment by delivery of promissory notes, payable without interest at the

termination of the trust to the remaindermen as then determined. The amended order omits reference to the manner in which the several sums are to be repaid. The orders also direct the trustee to withhold annually from and after February 23, 1927, a proper amount from income on account of depreciation reserve.

On January 17, 1929, Louise A. Whitcomb, Marguerite T. Whitcomb, Lydia L. Whitcomb, Charlotte A. W. Lepic, Napoleon Charles Louise Lepic, and Charlotte de Rochechouart executed and delivered to the said James Otis as trustee of said trust their promissory notes for the amounts by which the distributions made to them exceeded the distribution which would have been made had the trustee retained a reserve for depreciation of the trust property. Charlotte A. W. Lepic, Napoleon Charles Louise Lepic, and Charlotte de Rochechouart executed a joint note. The other notes were separate notes of the individuals concerned. These notes bear no interest and by their terms are payable at the termination of the trust, which will be upon the death of Charlotte A. W. Lepic. A payment of $10,700 has been made to the trust by the Estate of Louise P. V. Whitcomb.

The life beneficiaries, in their returns of income for the years mentioned, did not include the amounts paid to them in those years by the trustee representing their proportionate share of the depreciation sustained and deducted on the fiduciary return of the estate. The petitioner increased the

income shown on the several returns by said proportionate share of said depreciation and determined deficiencies in tax as hereinabove set forth. The Board of Tax Appeals, six members dissenting, reversed and set aside the determination of the Commissioner.

SUMMARY OF ARGUMENT

For nearly forty years the life beneficiaries under a deed of trust created in 1889 received and enjoyed the full income therefrom undiminished by any amounts on account of depreciation reserve, although depreciation was claimed and allowed to the trustee. After adverse decisions of the Board of Tax Appeals and the Court of Appeals of the District of Columbia upon the right of certain life beneficiaries (including respondent's decedent) to deduct depreciation with respect to earlier years, an order directing repayment of the amounts received attributable to the account of the depreciation reserve for the years 1913 to 1927 was entered by a state court in a friendly settlement of the trustees account. The order met with scarcely more than nominal compliance on the part of respondent.

The context and legislative history of Section 219 of the Revenue Act of 1921 and corresponding sections of later statutes clearly indicate that it contemplates two types of distributions to beneficiaries, one of current income distributed under the terms of a self-executing deed of trust, as in the present case, and the other where distribution is made by a guardian under court orders. The dis-

tributions made in the present case were in fact and in law controlled by the original deed of trust executed in 1889.

The mere construction of a will, contract, or other instrument by a state court will not be adopted by a Federal court as conclusive unless it has been settled by the highest court of the state and so long acquiesced in as to constitute a rule of property. Where this situation does not obtain the United States court is in duty bound to exercise its own independent judgment, as it always does when the case before it depends upon the doctrines of commercial law or general jurisprudence. These principles have the support of a line of decisions of the Supreme Court extending from *Swift* v. *Tyson,* 16 Pet. 1, to *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518.

The majority opinion of the Board of Tax Appeals in this case is capable of being sustained, if at all, on the sole premise that the orders entered by the probate court in San Francisco retroactively changed the taxable status of income distributed during prior years. We know of no authority which holds that the decision of a state court can divest parties of rights previously accrued under a Federal statute. The practical result of applying such a doctrine in the administration and collection of the Federal revenue would be far-reaching and detrimental, paving the way for grave abuses. It should not and need not be countenanced in the existing state of the law.

ARGUMENT

It is believed that discussion of the question presented by this record may well be prefaced by a brief analysis of the fact situation. The respondent's decedent was one of the life beneficiaries under a deed of trust executed by her husband, A. C. Whitcomb, who died in 1889. (R. 34.) The successive trustees accounted annually until 1902, but no formal account was filed thereafter until 1928. (R. 38, 127.) The trust property consisted initially chiefly of nondepreciables, but later, by a process of gradual conversion, it came to be composed largely of improved real estate subject to depreciation. (R. 35–36.) The trust instrument directed payment of one-third of the life income to respondent's decedent (R. 77), and in pursuance thereof the said one-third was paid undiminished by any amounts on account of depreciation reserve and the other life interests were similarly treated (R. 36–38).

Respondent's decedent, together with two other life beneficiaries under the trust, disputed the determination made by the Commissioner of Internal Revenue for the years 1917 to 1920, inclusive, contending that they were wrongfully taxed in those years in respect of depreciation which had been allowed as a deduction in determining the net income of the trust for the years involved. The Board of Tax Appeals approved the Commissioner's determination, concluding that the distributive shares of the beneficiaries for tax purposes must be computed with due regard for what they

actually received, and that depreciation, which affects only capital assets and not income, may not be deducted by life beneficiaries. *Louise P. V. Whitcomb et al.,* 4 B. T. A. 80. The Board decided another appeal by one of the same parties presenting the same question upon the authority of the foregoing case. *Marguerite T. Whitcomb,* 5 B. T. A. 191. This decision was reviewed and approved by the Court of Appeals of the District of Columbia, the decision being entered April 2, 1928, and reported 25 F. (2d) 528, *sub nomine Whitcomb* v. *Blair.*

The surviving trustee filed fiduciary returns for the years 1921 to 1926, inclusive, deducting in the computation of the net income of the trust in each year an amount representing exhaustion, wear and tear sustained by the trust. He did not withhold from the beneficiaries to whom income payments were being made the amount covered by the depreciation deduction and each of the beneficiaries received his or her ratable share thereof during the above period just as in the preceding years. These amounts were excluded in the income-tax returns filed on behalf of the beneficiaries but added back to income by the Commissioner. (R. 25.) The deficiency was asserted upon March 23, 1926. (R. 7.)

On September 5, 1928, more than two years after the assertion of the deficiency against this respondent, and five months after the decision of the Court of Appeals in *Whitcomb* v. *Blair, supra,* the trustee filed his account for the period February 23, 1903,

to February 23, 1928 (R. 38), and prayed for its approval (R. 110–128). Although the remaindermen, Napoleon Chales Louis Lepic and Charlotte de Rochechouart, were nonresident aliens residing in France, they filed their objections to the account covering the years 1913 to 1927, inclusive, on the second day following. (R. 129–132, 140.) The trustee answered four days later. (R. 133–135.) On September 19, 1928, two weeks after the account was filed, the court entered a decree (R. 136–139) in which it set forth the amount of depreciation of the property of the trust from 1913 to 1927 as determined by the United States Government in connection with the income-tax returns of the trust and held that the remaindermen's objections to the trustee's account were sustained in so far as the trustee had failed to withhold from distribution to the beneficiaries amounts sufficient to offset the depreciation sustained by the trust property. The beneficiaries were required by the court to repay to the trustee the respective amounts received by them referable to the depreciation account during the years 1913 to 1927 "by making, executing, and delivering to said Trustee their respective promissory notes, payable without interest, at the termination of said trust to the order of the remaindermen." (R. 138–139.) An amended order filed upon the same day eliminated reference to the fact that the amounts of depreciation were those determined by the Federal internal revenue authorities, and also

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omitted reference to the notes proposed to be executed. (R. 140–144.) Notes were in fact executed by or on behalf of the several beneficiaries other than respondent's decedent. (R. 145–148.) Although Napoleon Charles Louis Lepic and Charlotte de Rochechouart were remaindermen and not life beneficiaries and hence not in receipt of any income from the trust, they joined in the note of their mother, Countess Charlotte Andree Whitcomb Lepic. (R. 145.) A payment of $10,700 was made to the trustee by the estate of Louise P. V. Whitcomb. (R. 42.) The record does not disclose on what account or with respect to what year or years this payment was made.

With this résumé of the most significant facts we proceed to a consideration of the reasons which, it is believed, require reversal of the decision of the Board of Tax Appeals.

I

The distribution of the income to life beneficiaries, including respondent's decedent, was controlled in fact and in law by the terms of the deed of trust executed in 1889

The deed of trust executed by A. C. Whitcomb in 1889, pursuant to which distribution was made, required the trustee to pay to his wife, the respondent's decedent, "one-third part of the interest" from the property placed in trust "after payment of my [the settlor's] debts." (R. 77.) There was no provision for a depreciation reserve and no authority to the trustee to withhold income on that account or otherwise. Pursuant to the terms of

the instrument payments were made of an undiminished one-third of the net income of the trust until the death of respondent's decedent in 1921, and a lesser fraction to her estate thereafter to and including 1926, no amount being withheld in any year on account of depreciation reserve or otherwise. This situation leads to the question whether the taxing authorities in the administration of the Federal revenue laws are obliged to ignore the actual course of distribution of the trust income consistently followed over a period of almost forty years.

Section 219 (a) of the Revenue Act of 1921 extends the income tax imposed by earlier sections to estates and trusts including—

> (4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

We submit on behalf of the Government that the statute has the effect of placing in juxtaposition two methods pursuant to which income is commonly distributed, one, by virtue of the terms of a self-executing deed of trust as in this case, and the other by force of an order of court required where income is distributed by a guardian to an infant. This view of the statutory provision is strengthened by the succeeding subsections, notably 219 (b), (d), and (e). Thus, in subsection 219 (b) the statute provides for deductions for charitable contribu-

tions such as are set forth in Section 214 (a) (11) of the statute, specifying:

> * * * there shall also be allowed as a deduction, without limitation, any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in paragraph (11) of subdivision (a) of Section 214.

No reference to "order" is made in this connection, for obviously a guardian of an infant would not be required by court order to distribute income to charities. However, this provision serves to emphasize the fact, really quite an obvious one, that Section 219 (a) (4) contemplates two types of distributions, one of current income pursuant to a trust instrument, the other of income distributable under court orders.

The provisions in each of the later subsections relate back specifically to Section 219 (a) (4). From this it follows that the "order" referred to in subsections (b), (d), and (e) is the order spoken of in subsection (a) (4). Since that "order" relates exclusively to guardians, it follows that Congress intended the trust instrument to control in the case of trusts and the court order in the case of guardians. This separation is brought out in the Revenue Acts of 1924 and 1926, subsection 219 (b) (2) of which provides:

> There shall be allowed as an additional deduction in computing the net income of the

> estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not.

The legislative history demonstrates conclusively that the statutory changes were not the manifestation of a change of legislative purpose, but were intended to clarify the existing law.[1] Clarifying provisions in new legislation have repeatedly been recognized as declaratory of existing law. *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690; *Nichols* v. *Leach,* 50 F. (2d) 787, 790 (C. C. A. 1st), affirmed, 285 U. S. 165; *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837, 842 (C. C. A. 2d), certiorari denied, 282 U. S. 897–898; *McCauley* v. *Commissioner,* 44 F. (2d) 919 (C. C. A. 5th); *Dickey* v. *Burnet,* 56 F. (2d) 917 (C. C. A. 8th).

Considered from a practical viewpoint it seems idle to look beyond the written instrument creating the trust inasmuch as distribution was actually

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[1] S. R. No. 398, 68th Cong., 1st Sess., p. 25:

"SEC. 219. This section has been rewritten in order to secure clarity and to prevent the evasion of taxes by means of estates and trusts."

See also H. R. No. 179, 68th Cong., 1st Sess., p. 21.

made under and pursuant to that instrument for a period of thirty-eight years, including the tax period here involved. In fact and in law that instrument controlled the distribution of the trust income.

If we are correct in the position that distribution was controlled by the deed of trust, there is no necessity to consider the question whether the situation calls for the application of State or Federal law. The fact that the income was received by virtue of the instrument creating the trust and retained throughout the balance of the lifetime of respondent's decedent and thereafter until 1928 (with the exception of a relatively small unidentified portion restored to the trustee at an unspecified date in 1928 or later) is believed to decisively determine the question presented in favor of the petitioner. We do not believe it can be seriously contended that the amounts involved were not income in their entirety when received. This question was in effect settled as to this respondent by the decision of the Board of Tax Appeals in *Louise P. V. Whitcomb, supra,* from which no appeal was taken, considered together with the decision in *Marguerite T. Whitcomb, supra,* in which the Government's position was upheld by the Court of Appeals of the District of Columbia.[2] However, it is anticipated

[2] The question, thus limited, can scarcely be said to be an open one. The courts have repeatedly recognized that the beneficiary is taxable upon the full amount of income actu-

that the respondent will rely upon the supposed power of the orders entered by the state probate court in 1928 to retroactively change the taxable status of the income already distributed and attention will next be directed to questions presented by that view of the case.

II

The record discloses that there was no actual change in possession of all or a substantial portion of the income in question and no bona fide intention to restore the same to the trustee

In the objections filed to the trustee's account by the remaindermen it is alleged that an aggregate amount of $622,434.11 was improperly distributed which should have been retained by the trustee on account of depreciation reserve. The contest which followed the filing of the trustee's account was a "contest" in name only. The facts already recited suffice to demonstrate that it was nothing more than a friendly settlement. The account as filed covered the period from 1903 to 1928. The account was filed on September 5, 1928 (R. 38),

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ally received by or distributable to him during the year, without deduction for depreciation sustained by the corpus of the trust. *Codman* v. *Miles*, 28 F. (2d) 823 (C. C. A. 4th), certiorari denied, 278 U. S. 654; *Kaufman* v. *Commissioner*, 44 F. (2d) 144 (C. C. A. 3d); *Hubbell* v. *Burnet*, 46 F. (2d) 446 (C. C. A. 8th), certiorari denied, 283 U. S. 840; *Codman* v. *Commissioner*, 50 F. (2d) 763 (C. C. A. 1st); *Roxburghe* v. *Burnet*, 58 F. (2d) 693 (App. D. C.), certiorari denied, May 31, 1932; *Mary Roxburghe* v. *The United States*, 64 Ct. Cls. 223, certiorari denied, 278 U. S. 598. This is also the clear import of *Baltzell* v. *Mitchell*, 3 F. (2d) 428 (C. C. A. 1st), certiorari denied, 268 U. S. 690, and *Abell* v. *Tait*, 30 F. (2d) 54 (C. C. A. 4th).

and the second day thereafter objections were filed on behalf of the two remaindermen residing in France (R. 140). The exceptions were directed solely to the years 1913 to 1927—*the income-tax years.* Answer to the exceptions was filed on or about September 11th (R. 133–135) and the original and amended orders settling the account were both entered on September 19, 1928 (R. 136–139; 140–144). The rapidity with which the proceeding moved, the fact that the objections were restricted to those years in which income taxes were a factor, the evident absence of any real controversy, the peculiar character of the notes given by or on behalf of the beneficiaries other than respondent's decedent, and the fact that the entire proceeding took place *after* the decision in *Whitcomb* v. *Blair, supra,* are all elements of significance. While they may not indicate collusion—and we do not charge that they do—they may collectively give rise to a not unreasonable inference that the proceeding in the state probate court was dictated by the desire to avoid the consequences of the decision of the Court of Appeals in *Whitcomb* v. *Blair* and the associated decisions of the Board of Tax Appeals referred to hereinabove. Whether, under the circumstances, such an inference is to be drawn, we leave to the Court.

The state probate court adopted in its orders the amounts claimed by the remaindermen to have been improperly distributed. We have prepared a tab-

ulation showing the total sums distributed to life beneficiaries, together with the amounts received by or on behalf of respondent's decedent and the amounts subject to repayment under the court orders, which is incorporated in an appendix to this brief.

Reference to this tabulation discloses that respondent's decedent and her estate received $151,553.63 during the years 1913 to 1926, inclusive, which by virtue of the orders of the probate court was repayable to the trustee on acount of depreciation reserve. The record shows that of this sum "A payment of $10,700 (approximately 7 per cent of the amount due) has been made to the trust" by the estate of respondent's decedent. (R. 42.) The evidence throws no light upon the year or years to which the above payment is to be attributed. Logically it would seem reasonable to apply it against the earlier years first in which event it would have been absorbed many years before the taxable period. No notes or other obligations evidence even a simulated intention to repay the remaining 93 per cent. However, for reasons set forth elsewhere in this brief, we deem the matter of compliance or noncompliance with the orders of the probate court immaterial to a proper disposition of this appeal.

III

The question presented is one of general law arising under a Federal revenue statute as to which the Federal courts are free to exercise their independent judgment

When Section 219 (a) (4) of the Revenue Act of 1921, *supra,* is read in connection with the accompanying subsections, as it of course must be, it requires the inclusion for tax purposes of the income of beneficiaries distributable periodically pursuant to the instrument governing distribution or pursuant to the order governing distribution as the court may direct. What is the amount distributable pursuant to the instrument governing distribution in this case? Consideration of this question must be preceded by the consideration of another—is the question one of general law with reference to which the Federal court is free to exercise its independent judgment or is it one wherein the court is bound by local law? This question is believed susceptible of a ready answer.

An early leading case in which the Supreme Court considered the effect to be given the decisions of State courts is that of *Swift* v. *Tyson,* 16 Pet. 1. The 34th Section of the Judiciary Act of 1789, c. 20, 1 Stat. 73, 92, provided that the laws of the several states, when not in conflict with the Federal Constitution, treaties, or statutes, should be regarded as rules of decision in trials at common law in the United States courts, in cases where they applied. It was contended that by force of

this provision the Federal courts were required to follow the decisions of State tribunals in all cases to which they applied. The Supreme Court, speaking through Mr. Justice Story, declined to subscribe to this view, saying in part (pp. 18–19):

> In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intend-

> ment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they can not furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. * * *

In *Lane* v. *Vick,* 3 How. 463, the Court was obliged to construe a will which had been the subject of earlier interpretation by the Supreme Court of Mississippi. The construction adopted by the State court was urged to be binding upon the Federal court. The Supreme Court rejected this contention, saying (p. 476):

> With the greatest respect, it may be proper to say that this court do not follow the state courts in their construction of a will or any other instrument as they do in the construction of statutes.

Lane v. *Vick, supra,* was decided by divided court, but any doubt as to the authority to be accorded the majority opinion is dispelled by later decisions of the same court.

The earlier decision in *Swift* v. *Tyson, supra,* was approved and applied in *Oates* v. *National*

Bank, 100 U. S. 239, 246, and *Railroad Co.* v. *National Bank,* 102 U. S. 14, under somewhat similar circumstances.

A rather enlightening discussion of the subject occurs in *Burgess* v. *Seligman,* 107 U. S. 20. In that case, which involved the construction of a Missouri statute exempting certain classes of stockholders from liability for corporate debts upon dissolution, the Supreme Court of Missouri, after the Federal circuit court had decided the case, made a contrary decision against the same stockholders at the suit of another plaintiff, holding that the defendants did not come within the exempting clause of the statute. The Supreme Court refused to be bound by the State court's decision. We quote from its opinion as follows (pp. 33–34):

> We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, coordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and in-

convenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded

> as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. * * *

The situations in which the Federal courts will adopt as controlling the State court decisions are discussed in *Bucher* v. *Cheshire Railroad Co.,* 125 U. S. 555, and are aptly summarized in the third syllabus of the reported case as follows (p. 555):

> The courts of the United States adopt and follow the decisions of the highest court of a State in questions which concern merely the constitution or laws of that State; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character, when established by repeated decisions.

Barber v. *Pittsburgh, Fort Wayne and Chicago Ry. Co.,* 166 U. S. 83, related to the construction of a will which had previously been interpreted by the Supreme Court of Pennsylvania. The court thus states the question presented (p. 99):

> Whether the opinion of the Supreme Court of the State in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises, or is a decision upon the construction of this particular devise.

The court then disposed of the question, stating that although a construction of certain words in deeds or wills of real estate which has become a settled rule of property in a State may be followed by the Federal courts in determining title to land within the State, nevertheless a single decision of the highest State court upon the construction of the words of a particular devise is not conclusive evidence of the State law in a case in the Federal courts involving the construction of the same or like words between other parties or even between the same parties or their privies unless presented under such circumstances as to constitute an adjudication of their rights.

The principles above discussed are reviewed by the Supreme Court in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349. There the Court recognized that,

although the construction of a statute by the Supreme Court of a State may be followed with reference to the interests it may affect or the parties to the suit in which its construction is involved, the mere construction of a will or contract by a State court will not be adopted as conclusive unless it has been settled by the highest court of the State and has been so long acquiesced in as to constitute a rule of property. Where neither of these situations is presented, the court conceives that the Federal tribunal is in duty bound to exercise its own independent judgment as it always does when the case before it depends upon the doctrines of commercial law or general jurisprudence.

The principles of several of the cases above discussed were reiterated and applied by this Court in *Bancroft* v. *Hambly,* 94 Fed. 975. See also *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.,* 276 U. S. 518; *Messinger* v. *Anderson,* 171 Fed. 785 (C. C. A. 6th); and *Cole* v. *Pennsylvania R. Co.,* 43 F. (2d) 953 (C. C. A. 2d).

It seems abundantly clear in the light of the preceding discussion that the orders of the probate court in the present case would not be conclusive upon this Court. The question is one arising under a Federal statute, namely, a revenue act. While it depends upon the construction of the deed of trust executed by A. C. Whitcomb, there is nothing in the entire record to indicate the existence and applicability of any settled rule of property established by repeated decisions of the highest

State court before the rights of the parties accrued. Obviously, this is simply a case of a particular instrument to be construed as to which the Federal court would not only be permitted but in duty bound to exercise its own independent judgment.

IV

Even if it be conceded for the purpose of argument that local law should control, nevertheless the orders of the State court could not under the circumstances of this case retroactively change the taxable status of distributions already made

The trust instrument, as already noted, was executed in 1889 and presumably went into effect at or about that time. Under its terms the trustee distributed the full amount of the net income accruing without reference to a depreciation reserve for a period of approximately 38 years. Two years after the last distribution was made to the estate of the respondent's decedent the court orders were entered in a friendly settlement of the trustee's account. Although the suit may not have been collusive, it was certainly an uncontested one. A judgment entered in such a suit is a *pro forma* determination which should not be binding upon Federal courts. *Fidelity & Columbia Trust Co.* v. *Lucas,* 52 F. (2d) 298 (W. D. Ky.), and *Ford* v. *Commissioner,* 51 F. (2d) 200. Even if our views with respect to the absence of controlling effect of the State law are incorrect, nevertheless it is perfectly clear that the right to taxes had accrued in the Federal Government long before the State court

announced its conclusion which is sought to control the rights of the Federal Government. It seems obvious that the decision of a State court can not divest parties of rights which have previously accrued under a Federal statute, and certainly there is ample authority to support this conclusion. *Burgess* v. *Seligman, supra* (p. 35); *Anderson* v. *Santa Anna,* 116 U. S. 356; *Great Southern Fire Proof Hotel Co.* v. *Jones,* 193 U. S. 532; *Kuhn* v. *Fairmont Coal Co., supra* (p. 360); *Fidelity & Columbia Trust Co.* v. *Lucas, supra.* No reason is apparent why the sovereign should not be entitled to the benefit of the rule just as well as its subjects.

The case last cited related to the construction of a will and the fact background is so similar to that presented by this record that we venture to quote at some length from the opinion of the court (p. 301):

> At the very threshold of this inquiry, however, I am met with the contention of the plaintiff that this court is not free to exercise its independent judgment in construing the will, but that I am conclusively bound by the construction thereof made by the Jefferson circuit court in its judgment of June 11, 1927. While I recognize that as a general rule the decree of a state court, as to the meaning and effect of a will of one of that state's residents, is binding upon the federal court, I do not think that rule has any application under the facts disclosed by this record. I am satisfied that the judgment

relied upon must be regarded as nothing more than an agreed judgment. No other construction of the will than that contended for by the plaintiff was suggested to the commissioner in that case, and when the commissioner's report was filed, the plaintiff, as trustee, and the three children, each of whom was then of age, asked the court to adopt the commissioner's report, including his construction of the will. This the court did, by its judgment entered on the same day. The court in this judgment was careful to point out that the trustee and the three children had each entered a motion that the report be approved, and that they were the only parties interested in the estate. The obvious deduction is that the circuit court did the very natural thing of adopting the commissioner's report, when all the interested parties were present and asking that it be adopted. The government was not represented in the proceeding, although the trustee and the three children each knew that the government was contending for an entirely different construction of the will, and, on the strength of that contention, has already assessed taxes against the trustee of the L. P. Ewald estate in large amounts for each of the years from 1917 to 1924, both inclusive, and had enforced payment thereof; and they knew that the trustee was demanding a refund of these taxes based upon the construction of the will which they were asking the circuit court to adopt. They likewise knew that a similar assessment would

be made by the government for the years 1925 and 1926. So far as this record shows, the controversy between the government and the trustee as to the construction of the will was in no way brought to the attention of the circuit court.

Under these circumstances it would shock one's sense of justice to hold that the government is concluded by the state court judgment. *Furthermore, it is well settled that a decision of a state court, establishing a local rule of property or, construing a state statute or a contract made after the rights of a litigant in a federal court suit had accrued, and in a case to which he was not a party, is not binding upon the federal court.* I know of no reason why this rule should not apply to the construction of wills. See *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, and authorities cited.

I therefore conclude that I am not only free, but it is my duty, to make my own construction of the will in this case. (Italics supplied.)

The facts in this case also bear a strong resemblance to those in *Ford* v. *Commissioner, supra,* a decision by the Circuit Court of Appeals for the Sixth Circuit. There the executors of an estate which consisted mostly of stocks made a partial distribution in 1920 of the stocks and the legatees received the dividends therefrom in 1922. The probate court in 1926 held the distribution to be premature and ordered the legatees to account for

the principal and income of the stock from the date of distribution up to December 31, 1922. The matter was handled entirely by book entries. The court said (p. 207):

> In fact, the petitioners who received the 1921 and 1922 dividends never paid back any part thereof, and the income taxes for both years, based on the receipt of these dividends, were paid by the petitioners. * * *
>
> We think these 1922 dividends were taxable income received by the petitioners during that year. Certainly they then had complete legal title to the stock and to the dividends. *If taxes regularly assessed could be invalidated, an indefinite number of years later, by a consent judgment purporting to vacate the title of the taxpayer to the fund he had reported as income, the necessary system of tax collection would be much impaired. The true normal criterion to be applied in this class of case is the actual receipt and retention during the year in question of what was then considered to be income, not whether the taxpayer exposed himself to possible personal liability.*
>
> If it were to be conceded that a taxpayer who, before making his return, or perhaps even later, discovers that what he thought was income was improperly paid to him, and who must and does return it, should be relieved from the tax, the concession does not reach a case where the flaw in his title is only a claim of defect, until at a later time it is established, one way or the other, by a court

> judgment. In that respect the case is within the rule applied by the Supreme Court in *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 365, and by this court in *Board* v. *Commissioner,* 51 F. (2d) 73, decided June 11, 1931. Neither would the concession reach a case where the taxpayer did not repay or give up the income, but only permitted it to be charged against himself as a matter of bookkeeping, knowing that his counter equities were such that the charge against him would be uncollectible. (Italics supplied.)

It is to be remembered that the respondent's decedent and her estate received and retained the entire income distributable to her under the trust during the taxable period involved. It is true that $10,700 has been repaid to the trustee by respondent (R. 65–66), but it does not appear to what year or years this payment relates or when it was made. Even if it did appear, it would be a reason for reducing the income of the year of payment rather than for making a retroactive change in the amount of respondent's net income for the earlier taxable years. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359.

If this Court approves the majority decision of the Board of Tax Appeals it will in effect sanction the doctrine that a State court can divest parties of rights previously accrued under a Federal statute. The practical result of applying such a doctrine in the administration and collection of the Federal

No. 6847.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HERMAN C. SOMMER,
Defendant-Appellant,

vs.

ROTARY LIFT COMPANY AND PETER J. LUNATI,
Plaintiffs-Appellees.

BRIEF FOR PLAINTIFFS-APPELLEES.

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Cases Cited.

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BRIEF FOR PLAINTIFFS-APPELLEES.

FOREWORD.

For convenience, defendant-appellant will be referred to as the defendant, and plaintiffs-appellees as the plaintiffs.

Defendant's brief abounds in gross abuse—even insult—of the Patent Office, the District Court, and of plaintiffs' counsel. It would appear that Court and counsel, rather than the parties, are on trial.

The aspersions against counsel will be ignored,—not because counsel are callous or unmindful of the reflections upon their professional conduct, integrity, and ethics, but because we confidently believe that the record sufficiently answers these aspersions, and because we believe that this

Court will be interested in those questions which can be raised by the defendant's appeal rather than in questions which could be pertinent only upon Congressional proceedings to impeach Judge Hollzer, or upon proceedings to disbar counsel.

This is a patent infringement suit in which the plaintiffs moved for a preliminary injunction. All of the requisites for the grant of such a motion were present, *i. e.,* (1) unquestioned title in the plaintiffs, (2) an adjudication of validity and infringement at final hearing in a long and thoroughly contested suit, and (3) a clear case of past and threatened future infringement by the defendant. The District Court granted the motion for preliminary injunction.

Was it an abuse of the discretion which the law reposes in Federal District Courts, to grant the plaintiffs' motion for a preliminary injunction?

This is the only question which can properly be raised upon an appeal to this court.

But as a vehicle for the torrent of vituperative vilification which counsel for the defendant have heaped upon Court and counsel, this appeal pretends to have been based upon an assignment of no less than seventy-five separate and distinct errors. The quality of these assignments of error is indicated by the following quotations:

> "IV.
>
> "In denying defendant's motion for a bill of particulars.
>
> "VI.
>
> "In ordering hearing on plaintiffs' motion for preliminary injunction at request of plaintiffs continued from June 1, 1931, to June 29, 1931.
>
> "XII.
>
> "In not giving this cause a day certain for trial on the 9th day of November, 1931, pursuant to this Court's order of October 12, 1931, placing said cause on the calender for setting on that said day.

"XV.

"In not giving this cause a day certain for trial on the 11th day of January, 1932, pursuant to order of December 30, 1931, continuing the case to said 11th day of January, 1932, for setting.

"XVII.

"In ordering, upon plaintiffs' request, that plaintiffs be permitted to file reply affidavits and brief upon plaintiffs' motion for preliminary injunction not later than twenty days before the date of the hearing of said motion for preliminary injunction when the court had, on June 26, 1931, ordered that plaintiffs file such reply affidavits and brief not later than thirty days before hearing on said motion for preliminary injunction.

"XXVII.

"In considering and allowing to remain of record various written communications from counsel for plaintiffs pertinent to the merits of this cause and of the said motion for preliminary injunction.

"XXIX.

"In admitting Lynn A. Williams, attorney for plaintiffs, to practice in this court for purpose of this cause without a proper introduction or upon proper motion of an attorney at law entitled and admitted to practice in the United States District Court for the Southern District of California.

(The admission of counsel for the plaintiffs *pro hac vice,* having been ordered upon the motion of Benjamin S. Parks of the Los Angeles Bar, and a member of the Bar of the California State and Federal Courts.)

"LXVII.

"In limiting counsel's time in which to make out and explain and argue defendant's showing for a supersedeas bond pending appeal.

"LXXI.

"In refusing to follow defendant's suggestions as to the amount of bond to be put up by plaintiffs as a condition to the grant of a preliminary injunction and in making said bonds no more than Twenty-five hundred dollars ($2500.00).

"LXXII.

"In exactly following plaintiffs' suggestion in making plaintiffs' bond as a condition to the grant of a and in making said bond no more than Twenty-five hundred dollars ($2500.00)." Etc., etc.

We cannot believe that this Court will entertain or consider such assignments of error as these. We cannot believe that this Court will be swayed by the unfounded charges of bias, prejudice, and stupidity which have been hurled at Judge Hollzer, nor by the unfounded assertions of "inethical" conduct on the part of counsel for plaintiffs.

Your Honors will find that the only question which can properly be presented under the defendant's appeal, is a very simple one: Did the District Court abuse the discretion which the law imposes upon the District Court alone in granting a motion for a preliminary injunction in a case where all of the requisites for a preliminary injunction were fully and completely met?

In the following brief we shall address ourselves primarily to this one question.

We cannot believe that United States Circuit Courts of Appeal will undertake ordinarily to substitute their discretion for that of the District Court in connection with the grant or refusal to grant preliminary injunctions in patent suits. Such a practice will invite the defeated party on every such motion to bring his case before the Court of Appeals, and it will be the discretion of the Appellate Court and not that of the District Court, which will determine the outcome of every such motion. If this is to be the practice, such motions might better be presented to the Appellate Court in the first instance, because certainly the District Court, not having seen the affiants or heard the testimony of any witness, but only the arguments of counsel, is in no better position to determine a motion for preliminary injunction than is the Appellate Court (except

only, perhaps, that the District Court ordinarily devotes far more time to the hearing of the arguments of counsel and to the examination of the physical exhibits than can be devoted by an Appellate Court).

Recognizing, however, that Courts of Appeal have in some few instances exercised their power to decide motions for preliminary injunction upon the basis of their own discretion, and regardless whether there has been abuse of discretion by the District Court, we shall devote ourselves secondarily to the proposition that all three of the courts which have heretofore passed upon the Lunati patent in suit have been right in holding it both valid and infringed.

Finally, we shall devote ourselves briefly to the proposition that the District Court was right in sustaining the plaintiffs' objections to the defendant's interrogatories (although we recognize no ground upon which the Court of Appeals has jurisdiction of this question at this stage of this proceeding).

POINTS AND AUTHORITIES.

(A) Relative to the Primary Question Whether the District Court Abused Its Discretion in Granting a Preliminary Injunction.

I.

This appeal only challenges the discretion of the District Court in granting a motion for preliminary injunction in a patent suit.

Sherman-Clay Co. v. *Searchlight Horn Co.,* 214 Fed. 99.

Stearns-Roger Mfg. Co. v. *Brown,* 114 Fed. 939.

II.

Plaintiffs, having established (1) title, (2) presumptive validity and (3) threatened infringement, are entitled to a preliminary injunction.

Kings County Raisin & Fruit Co. v. *United States Consol. Seeded Raisin Co.*, 182 Fed. 59.

III.

The Lunati patent, having been sustained at final hearing in a contested case, should, on motion for preliminary injunction, be presumed valid unless new defenses are presented—defenses so cogent and persuasive that the Court is convinced that had they been presented in the earlier suit the patent would have been declared invalid.

Kings County Raisin & Fruit Co. v. *United States Consol. Seeded Raisin Co.*, 182 Fed. 59.

Sherman-Clay Co. v. *Searchlight Horn Co.*, 214 Fed. 99 (9th C. C. A.).

Fireball Gas Tank and Illuminating Co. v. *Commercial Acetylene Co.*, 198 Fed. 650 (8th C. C. A.).

Interurban Ry. & Terminal Co. v. *Westinghouse Electric & Mfg. Co.*, 186 Fed. 166 (6th C. C. A.).

New York Filter Mfg. Co. v. *Niagara Falls Water-Works Co.*, 80 Fed. 924 (2nd C. C. A.).

Bresnahan v. *Tripp Giant Leveller Co.*, 72 Fed. 920 (1st C. C. A.).

IV.

Defendant presented no new defenses—only a rehash of old and discredited ones.

V.

The District Court's finding of infringement should not be disturbed unless it involves an obvious error of law or a serious mistake of fact.

Stearns-Roger Mfg. Co. v. *Brown*, 114 Fed. 939.

VI.

Plaintiffs were not guilty of laches—either in bringing suit or in proceedings for preliminary injunction.

Stearns-Roger Mfg. Co. v. *Brown,* 114 Fed. 939.

(B) If This Circuit Court of Appeals Is Disposed to Substitute Its Discretion for That of the District Court, Then for the Following Reasons We Submit That the Plaintiffs Are Entitled to An Injunction.

VII.

A new combination of old elements productive of new and beneficial results is patentable.

Consolidated Contract Co. v. *Hassam Paving Co.,* 227 Fed. 436.

Loom Co. v. *Higgins,* 105 U. S. 580; 26 L. Ed. 1177.

Stebler v. *Riverside Heights Orange Growers' Ass'n.,* 205 Fed. 735.

VIII.

Lunati's invention is a new combination of elements, never before assembled as he assembled them and productive of new and highly beneficial results,—results long sought but never before attained.

IX.

"Double use" means the use of the same device for an analogous purpose. Even the use of the same device for a non-analogous purpose may be invention.

Robinson on Patents, Vol. 1, Sec. IV, p. 354.

Mast, Foos & Co. v. *Stover Mfg. Co.,* 177 U. S. 485; 44 L. Ed. 856.

Walker on Patents (Sixth Edition), Vol. 1, p. 96.

Traitel Marble Co. v. *U. T. Hungerford,* 18 Fed. (2d) 66, 68.

X.

Claims must be construed in consonance with the accompanying specification—when so construed claims 2, 3, 7 and 8 of the Lunati patent are not met by the prior art.

Greenawalt v. *American Smelting & Refining Co.*, 10 Fed. (2d) 98.

XI.

The Lunati lift is a different device from any in the prior art—consequently his patent is not merely for a double use.

XII.

Defendant's lift infringes claims 2, 3, 7 and 8 of the Lunati patent.

XIII.

The doctrine of file-wrapper estoppel goes only to this extent: The claim of an issued patent cannot be construed in such a way as to make it identical with a claim which has been abandoned during the prosecution of the application—the file-wrapper of the Lunati patent creates no estoppel against an interpretation of claims 2, 3, 7 and 8 to include defendant's lift.

Angelus Sanitary Can. Mach. Co. v. *Wilson*, 7 Fed. (2d) 314.

XIV.

Plaintiffs' showing not open to criticism because of absence of "expert" affidavit—none necessary in simple case.

Hardinge Conical Mills Co. v. *Abbe Engineering Co.*, 195 Fed. 936.

Safety Car Heating & Lighting Co. v. *Gould Coupler Co.*, 239 Fed. 861.

Kohn v. *Eimer*, 265 Fed. 900.

XV.

Defendant's "expert" affidavit of Lyndon largely composed of conclusions on questions of validity and infringement,—therefore incompetent and improper.

Walker on Patents (Sixth Edition), Vol. 1, p. 796.

Hardinge Conical Mill Co. v. *Abbe Engineering Co.*, 195 Fed. 936.

Safety Car Heating & Lighting Co. v. *Gould Coupler Co.*, 239 Fed. 861.

Kohn v. *Eimer*, 265 Fed. 900.

(C) The Circuit Court of Appeals Does Not Have Jurisdiction at This Stage of This Proceeding to Pass Upon Those Assignments of Error Which Questioned the Disposition by the District Court of the Objections to Interrogatories, Nevertheless—

XVI.

The District Court properly sustained plaintiffs' objections to defendant's 98 "First Supplemental Interrogatories."

U. S. Code, Title 35, Sec. 69 (Revised Statutes, Sec. 4920).

Federal Equity Rule No. 58.

Miller & Pardee v. *Lawrence A. Sweet Mfg. Co.*, 3 Fed (2d) 198.

STATEMENT OF CASE.

In order that the Court may have a really intelligible and, as plaintiffs' counsel believes, an accurate picture of the matter presented on this appeal, it seems necessary briefly to outline some of the more pertinent facts,—as counsel considers the record clearly to establish them.

Plaintiff Peter J. Lunati is the inventor-owner of the patent in suit (No. 1,552,326, granted Sept. 1, 1925—Rec. Vol. 3, p. 42). Plaintiff Rotary Lift Company is Lunati's exclusive licensee. These facts are not disputed.

Plaintiffs have no source of income other than that derived from the Lunati patent in suit (O'Brien Affidavit, Rec. Vol. 1, p. 29).

Plaintiffs first learned of defendant's infringement on January 28, 1931 (O'Brien Affidavit, Rec. Vol. 1, p. 253).

Defendant admitted statutory notice of infringement,—that in "February of the year 1931 . . . one of plaintiffs' counsel on a visit to the West Coast informed me that I was infringing the said Lunati patent" (Sommer Affidavit, Rec. Vol. 1, p. 332).

The bill of complaint was filed March 4, 1931 (Rec. Vol. 1, p. 8).

Plaintiffs' motion and *prima facie* showing for a preliminary injunction were filed March 27, 1931 (Rec. Vol. 1, pp. 9 to 30). On the same day a show cause order, **returnable on May 11, 1931,** was issued against the defendant (Rec. Vol. 1, p. 10). By this order defendant was given until April 15, 1931, to serve and file his showing in opposition to the motion and plaintiffs were given until May 6, 1931, to serve and file a reply showing.

Plaintiffs' right to a preliminary injunction was predicated upon a prior adjudication at final hearing, holding claims 2, 3, 7 and 8 of the Lunati patent valid

and infringed (the suit hereinafter referred to as the Orgill suit).

On April 1, 1931, defendant moved to dismiss the bill of complaint (Rec. Vol. 1, p. 32). This motion was denied on April 6, 1931 (Rec. Vol. 2, p. 910).

On April 2, 1931, defendant obtained, **ex parte and without notice**, an extension of time to file his showing and a continuance of the return or hearing from May 11 to **June 1, 1931** (Rec. Vol. 2, p. 910).

In view of the defendant's contention that the preliminary injunction should have been denied because of the plaintiffs' "laches" in arguing the motion, it is to be noted here that this postponement of the argument from May 11 to June 1, 1931, was secured by the defendant **ex parte**, and without notice to the plaintiffs. Counsel for plaintiffs did not, therefore, have any opportunity to explain to the Court that for nearly a year he had been planning his engagements in such a way as to be married on June 6, 1931, and then in July to go to Johns Hopkins Hospital at Baltimore for a series of operations to restore his eyesight, which had been lost by the growth of cataracts. All of the plans of counsel for plaintiffs had been made in such a way as to accommodate the argument of this motion for preliminary injunction at Los Angeles on May 11 (Rec. Vol. 1, p. 176). As will subsequently appear, the postponement which was secured upon the defendant's **ex parte** application, made it necessary for the plaintiffs to ask for a further postponement to accommodate the engagement which counsel for the plaintiffs had made to be married, and then to have a series of surgical operations upon his eyes at Baltimore.

On May 5, defendant's answer and counterclaim were filed (Rec. Vol. 1, pp. 39 to 54). Plaintiffs moved on May 16, 1931, to dismiss the counterclaim (Rec. Vol. 2, p. 911) and this motion was granted on May 25, 1931 (Rec. Vol.

2, p. 911). Subsequently an amended counterclaim was filed (Rec. Vol. 1, p. 164).

On May 12, 1931, defendant filed his showing in opposition to plaintiffs' motion for preliminary injunction (Rec. Vol. 1, pp. 56 to 144 and 327 to 530).

The operations on the eyes of plaintiffs' counsel were performed as scheduled in July, August and September but it was not until October 13 that counsel "was able either to see one well enough to recognize him or able to read anything at all." Yet, "in anticipation of the success of these operations" notice, in accordance with the postponement order of June 26, 1931 (Rec. Vol. 2, p. 912), was served on defendant's counsel October 2, 1931, that plaintiffs would move that the motion for preliminary injunction be heard on 30 days' notice, *i. e.,* on Monday, November 9, 1931 (Rec. Vol. 1, p. 236).

Plaintiffs' counsel had long planned to be married on June 6, 1931, but a trial at Brooklyn interfered and he was married on June 27 and took a hurried trip to Europe which consumed "exactly three weeks from New York back to New York." And on the day of his return he went to Johns Hopkins Hospital and was either there or in its vicinity until October 13, 1931 (Rec. Vol. 2, pp. 618-624).

The District Court was satisfied that the postponement from June 1, 1931, to November 9, 1931, was amply explained and fully justified, because before plaintiffs' counsel had completed his explanation the following colloquy between the Court and counsel occurred:

> "*The Court:* The court will interrupt here to say there is no occasion for going into any further detail on this feature of the case.
>
> "*Mr. Williams:* I do not wish to go further. Your Honor means the circumstances for these delays?
>
> "*The Court:* Yes.
>
> "*Mr. Williams:* I take it that, you mean on this question of laches or delay generally, if you do not want to hear more about that, I won't say anything.
>
> "*The Court:* No."

Nothing occurred which gave to the postponement of the arguments upon the motion for preliminary injunction the essential characteristic of "laches" or "estoppel *in pais*," —because nothing occurred and nothing was done which misled or could have misled the defendant to his detriment. He was not led to make any investment or to do anything else,—he was not lulled into a sense of security by virtue of anything which the plaintiffs did or failed to do, continuously from and after the day in February, 1931, when Sommer was notified of his infringement of the Lunati patent. He and his counsel were being told in the most emphatic manner that the plaintiff was aggressively seeking to put a stop to the defendant's continued infringement of the Lunati patent. The necessity for the further postponements of the hearing upon the plaintiffs' motion for preliminary injunction, which resulted from the initial postponement secured upon the *ex parte* application of the defendant, was fully explained in the plaintiffs' affidavits, and at all times the applications for these postponements made it unquestionably clear to defendant and his counsel that the motion for preliminary injunction would be argued just as promptly as conditions would permit. Indeed, the order granting the postponement requested by the plaintiffs was upon the express condition that the motion for preliminnary injunction might be called up for hearing upon thirty days' notice, and it was upon such notice served on October 2, 1931, that the arguments upon the motion were commenced on November 9, 1931. Throughout all of these proceedings the defendant and his counsel were being told in unmistakable terms that the motion for preliminary injunction was to be pressed as promptly and as vigorously as possible. Neither "laches" nor the estoppel which grows out of "laches," ever can attach under circumstances of this kind.

The hearing began, as noticed, on November 9, 1931, and proceeded with some slight interruption throughout that day. At the close of the session the hearing was continued until the next motion day—the following Monday—November 16 (Rec. Vol. 2, pp. 574 to 667).

On November 16, plaintiffs' counsel having been compelled to return to Chicago and thus unable to be present, the hearing proceeded with defendant's counsel alone.

Defendant's counsel did not complete his argument on November 16 and consequently the District Court found it necessary again to continue further hearing until November 30. And it appears that the Court had in mind "that this argument will be transcribed and that the other side will at least be offered an opportunity to make a reply, if there is any to be made" (Rec. Vol. 2, p. 721).

Except for some slight interruptions, all of November 30th was devoted to arguments by counsel for both parties and, neither side having finished, the District Court, with great consideration for both counsel and little for itself, permitted further and the final arguments by counsel for both parties to be sandwiched in before 10 o'clock and during the usual noon recess of a jury trial on December 1, 1931 (Rec. Vol. 2, pp. 725 to 821).

Defendant's counsel in their brief charge so frequently that the District Court erred in not granting an early date for trial and final hearing that it seems appropriate here to revert to a discussion between Court and defendant's counsel during the first of the three days' argument, viz., on November 9, 1931:

> "*The Court:* May we say this: *We, as yet, have not been apprized of any reason for advancing this case out of its order;* in other words, that it will be set at such time as it will be reached in the usual order, having in mind the condition of our calendar. So that, so far as setting the case at this term is concerned, there is not a chance; it will be nothing but a summary

order continuing the matter for the term and the case taking its turn, *unless some showing is made indicating why this case is entitled to be advanced.*

"*Mr. Blakeslee:* The reason, of course, we advance that is: We think it would promote the doing of justice here for the party entitled to receive it, to have the matter heard in extenso and completely instead of the necessarily fragmentary way, which is the only way that a preliminary injunction motion which goes into all the issues can be heard.

"*The Court:* Yes, we all recognize that, *but we have to also keep in mind that there are many other cases that are in a similar status.*

"*Mr. Blakeslee:* Oh, yes.

"*The Court:* There is hardly a patent case involving injunction but what occupies a similar status, and as long as we have no further assistance than has been provided up to the present, we see no reason why other litigants who are entitled to the same consideration should be subjected to delays.

"*Mr. Blakeslee:* I repeat, the case was on the calendar the second—no, earlier than that—last month, three weeks ago, and it might have been then set ahead, had we not acceded to the suggestion it be continued to today for that purpose. I am simply calling that to the court's attention to show the stage to which this case has proceeded.

"*The Court:* May we suggest this: That an examination of the records of this court will readily disclose that there was not the slightest likelihood of this case being set during the present term, even had it been called at the beginning of the term. In other words, on this very calendar this morning there was an application to advance a case which has been at issue since March, 1930. *Now, that antedates the present case by fully a year. There is a man who, apparently, is likely to die because of a very serious injury. So, having in mind the condition of our calendar, we must take the position that this case must take its turn unless some showing is made indicating why it should be advanced over and above other cases.*

"*Mr. Blakeslee:* I take it further, then, that the court is not minded to consider a reference of this case, for the reasons which you have set forth?

"*The Court:* Yes." (Rec. Vol. 2, pp. 582, 583.) (Italics ours.)

The congested condition of the trial calendar as thus indicated by the District Court fully explains the reason—undoubtedly well known to defendant's counsel—why a trial of this cause could not have been arranged before December, 1931, and probably could not be had for sometime in 1932.

The matter of an early trial before the Court was again discussed on November 30, at which time the following colloquy between Court and counsel occurred:

> "*The Court:* In the event that a hearing could be accorded next month, that is, January, would your side be ready?
>
> "*Mr. Hinkle:* That I could not say. Mr. Williams will try that case, and I do not know. He is not here, and would have to speak for himself. I should imagine so, but I cannot bind him on that.
>
> "*The Court:* You will see him within the next few days?
>
> "*Mr. Hinkle:* I expect to.
>
> "*The Court:* May we ask you to have him telegraph to the court, indicating whether he could prepare to go to trial next month?
>
> "*Mr. Hinkle:* Yes, I can do that, but in the meantime, I think that this—
>
> "*The Court:* It may be that we can find some way; it may be that I may be relieved by the visiting judge who is likely to be here about the end of the month, that is, possibly be relieved long enough to hear this case.
>
> "*Mr. Blakeslee: By the way, of course, we would rather have your Honor hear it, and particularly inasmuch as your Honor has gotten such a comprehensive picture.*
>
> "*The Court:* What I have in mind is, that judge would take the other calendar.
>
> "*Mr. Blakeslee:* In that connection, I spoke yesterday of that Otis Elevator case and I have since talked with Mr. Lane, communicated with him in Chicago, who is chief counsel in that case, patent counsel and, as I mentioned yesterday, Mr. Leonard Lyon said he felt he could not try that case on the 5th of next month, the time it is set. Now, your Honor said something about you did not think it could be reached. That case

I presume would take a couple of weeks. That is another kind of elevator case, and Mr. Lane has said that he is willing to have this case stricken from the calendar, to be reset. Now, of course, that is a matter for your Honor to determine, but that would make some space there. That case might just be stricken from the calendar.

"*The Court:* No, as we indicated yesterday, we set two cases for the same time, having in mind some statement made to the effect that, by placing this case on the calendar and giving some indication that the defense was ready, perhaps it would bring the matter to the other side, the realization that the case was without merit and ought to be dismissed.

"*Mr. Blakeslee:* I do not know as we are capable of having that realization. I think it is of merit, but the point is this; Suppose Mr. Lane comes here from Chicago the 5th of next month, ready to try it, will the court be able to hear it?

"*The Court:* Now, we certainly do not expect to try that case. It was put on the calendar with the understanding it would merely serve that possibly essential purpose, but not if both sides were determined to go ahead, that we could hear it. Oh, no.

"*Mr. Blakeslee:* One reason for delaying that case was, there was litigation in the Second Circuit out of the same patent.

"*The Court:* Yes, you said you thought that would probably dispose of this." (The Otis case.) (Rec. Vol. 2, pp. 818 to 820.)

This discussion between the District Court and defendant's counsel also answers the implications—of course unfavorable to the District Court—which obviously Your Honors are expected to draw from the remarks and only partial quotation appearing at page 167 of Defendant's Brief, viz., that the District Court evidenced "a peculiar attitude" toward his trial calendar merely because he had set a case for trial out of order and that he might equally well have followed the same procedure in this case; whereas, as clearly appears, defendant's counsel well knew that the case which was set for hearing out of order could not and

would not be tried at the time set and that he had informed the District Court that some litigation in the Second Circuit involving the same patent would probably dispose of the California case.

As a result of the request of the Court that he be notified whether or not plaintiffs could prepare for trial in January, plaintiffs' counsel telegraphed the District Court on December 9th as follows:

> "Honorable Harry A. Holzer,
> Judge U. S. District Court,
> Post Office Building,
> Los Angeles, California.
>
> Pursuant to your request through Mister Hinkle I have just succeeded in readjusting my court engagements so that I can try the suit of *Lunati* v. *Sommer* beginning any day after December 28 and concluding any day before January 19.
>
> Signed: Lynn A. Williams."

Apparently the congested condition of the calendar of the District Court prevented the case from being set for trial before him during the time this telegram indicated plaintiffs' counsel would be free for such proceedings; and the persistent efforts of defendant's counsel to have the trial referred to a Special Master finally induced the District Court to abandon the plan of trying the case himself whereupon, on December 11, 1931, the Court telegraphed plaintiffs' counsel as follows (Rec. Vol. 2, p. 934):

> "Dec. 11, 1931.
>
> Lynn A. Williams, Attorney,
> 1315 Monadnock Block,
> Chicago, Ill.
>
> Have arranged with Judge Bledsoe who served in this court for many years as Judge to act as special master hearing Lunati case beginning December 29 stop Defense requests plaintiff answer or object to defendants interrogatories by December 16 stop Believe this reasonable in view of early trial stop Defense states if answers to interrogatories not satisfactory depositions will be taken in San Francisco without delay.

Defense also requests affidavit of his expert on file be received as direct testimony with leave to plaintiff to cross-examine witness pursuant to rule forty-eight. Please wire reply.

HARRY A. HOLLZER, U. S. Dist. Judge.
(311 Federal Bldg. Mu 2498)"

This telegram from Judge Hollzer made it clear that counsel for defendant had had some *ex parte* discussion with the Court relative to the proposed references and the proceedings incident thereto. It was in response to this telegram that counsel for plaintiffs telephoned to Judge Hollzer protesting against the proposed reference, which had not yet been ordered (Rec. Vol. 2, p. 838). It is this long distance telephonic protest and response to the defendant's *ex parte* representations and requests, as referred to in Judge Hollzer's telegram,—and this only, which by any possibility might constitute the basis for Mr. Blakeslee's recommendation of disbarment proceedings (Rec. Vol. 2, p. 946) and of censure, rebuke and discipline at the hands of the American Bar Association (Defendant's Brief, p. 58), of which counsel for the plaintiffs has long been a member.

On December 14, 1931, a formal order was entered without the consent of the parties, referring the matter to Benjamin F. Bledsoe as Special Master (Rec. Vol. 1, p. 282).

On November 17, 1931, defendant had filed ninety-eight "First Supplemental Interrogatories" relating to an alleged prior use by one John Cochin at San Francisco, California (Rec. Vol. 1, pp. 261 to 282). This alleged defense, claimed by defendant's counsel to relate to **"a complete anticipation"** of the Lunati patent (Appellant's Brief, p. 7) was not set up in the defendant's answer or any amendment thereto (Rec. Vol. 1, p. 39, p. 164). The time for filing answers and objections to these interrogatories was extended to and including December 22, 1931 (Rec. Vol. 2, p. 915). On December 21, 1931, plaintiffs' objections to all

of these "First Supplemental Interrogatories" were filed.

In view of the reference to the Special Master, before whom the trial was to commence on December 29, the District Court, at the request of defendant's counsel, asked plaintiffs' counsel to file answers or objections to these "First Supplemental Interrogatories" by December 16; but because of conflicting engagements of plaintiffs' counsel and the absence of Mr. O'Brien, President of the Rotary Lift Company, this request—it was not in any sense a modification of the order requiring the filing of answers or objections by December 22—could not be compiled with (Rec. Vol. 1, pp. 284, 285).

Defendant's counsel have tried to warp or misconstrue these two telegrams between the Court and plaintiffs' counsel into an agreement that plaintiffs would answer rather than file objections to the interrogatories. On December 21st and 23rd the matter of plaintiffs' right to object and—the District Court holding that plaintiffs' counsel had not agreed to answer—the matter of plaintiffs' objections thereto were argued before the District Court by defendant's counsel and plaintiffs' associate counsel of San Francisco (Rec. Vol. 2, pp. 822 to 866).

It may be well here to remark that plaintiffs' associate counsel from San Francisco are unfamiliar with any of the mechanical details of the Lunati patent and the prior art and consequently have been depended upon merely in connection with motions involving the pleadings and other formal matters.

On December 30, 1931, plaintiffs moved to revoke the reference, which motion was granted and the cause was continued to January 11, 1932, for setting for final hearing before the District Court (Rec. Vol. 1, pp. 305 to 319).

In addition to plaintiffs' objections to the reference, one of the reasons for the District Court's revocation of the reference of the trial to the Special Master was the insist-

ence of defendant's counsel that defendant be permitted to take depositions at San Francisco on the unpleaded alleged Cochin use or that the Special Master be empowered to sit at San Francisco to hear evidence pertaining to this alleged use.

On January 11, 1932, the Court, apparently having been unable to make the contemplated arrangements for another Judge to assume the remainder of the trial calendar, continued the matter of setting for two weeks (Rec. Vol. 2, p. 899).

On January 25, 1932, the setting of the cause for trial before the District Court was continued to March 7, 1932.

On February 6, 1932, the District Court entered an order granting plaintiffs' motion for a preliminary injunction. This order was not a formal order for a preliminary injunction, but directed plaintiffs' counsel to prepare and serve on defendant's counsel "the proposed order of injunction" and requested counsel for both parties to "submit written suggestions relative to the amount of the bond to be fixed as a part of the order granting the injunction" (Rec. Vol. 1, p. 325).

On February 23, 1932, both parties submitted a showing as to the amount of the bond to be required of plaintiffs.

Defendant's showing appears in the record Volume 2, at page 904.

Part of plaintiffs' showing, viz., the Affidavit of R. J. O'Brien, President of the Rotary Lift Company, appears in the record Volume 2 at page 899; but the principal part of plaintiffs' showing, viz., an Affidavit of Albin C. Ahlberg and plaintiffs' "Memorandum Relative to the Amount of the Bond to be Fixed as a Part of the Order Granting Preliminary Injunction" referred to in the O'Brien affidavit are not in the printed record but went up to this Court as physical exhibits.

On this same day defendant's counsel presented a premature petition for appeal from the order of February 6, 1932, which petition was denied without prejudice (Rec. Vol. 1, p. 326) and a formal order for preliminary injunction conditioned upon plaintiffs' furnishing a bond in the sum of $2,500 was entered (Rec. Vol. 2, p. 901). The District Court also denied defendant's application for supersedeas pending appeal.

On February 25th plaintiffs' bond was approved and filed and the writ of injunction *pendente lite* was issued (Rec. Vol. 2, p. 918).

Instead of petitioning to the District Court for an order allowing appeal from the preliminary injunction order of February 23rd, defendant petitioned, **ex parte and without notice** to plaintiffs or their counsel, on February 26, 1932, to one of the Judges of this Court and obtained an order allowing appeal and fixing the appeal bond at $5,000 to act as a bond for costs on appeal and to stay the operation and effect of the order for preliminary injunction entered on February 23rd (Rec., Vol. 2, pp. 946 to 965).

On March 7, 1932, the District Court set the cause for final hearing on June 14, 1932.

On March 23, 1932, plaintiffs filed a motion before this Court to set aside the order of February 26 in so far as the same stayed the preliminary injunction (Rec. Vol. 2, p. 971), which motion was supported by an affidavit of plaintiffs' associate counsel of San Francisco filed on March 28, 1932 (Rec. Vol. 2, pp. 974 to 1008).

On April 16, 1932, defendant's supersedeas bond was approved and filed (Rec. Vol. 2, pp. 964-5).

On May 11, 1932, defendant petitioned this Court for an order staying the trial in the lower court pending the determination of the appeal to this Court (Rec. Vol. 2, pp. 1016 to 1029).

On May 16, 1932, this Court denied plaintiffs' motion to set aside the supersedeas of preliminary injunction and granted defendant's motion to stay the trial pending appeal (Rec. Vol. 2, pp. 1011 to 1014; pp. 1030, 1031).

ARGUMENT.

Plaintiffs Entitled To, and District Court Did Not Abuse Discretion in Granting, Preliminary Injunction.

As a matter of legal principle and procedure this appeal only challenges the discretion of the District Court in granting a motion for preliminary injunction.

> "The granting of a preliminary injunction in a suit for infringement of a patent rests within the sound discretion of the trial court . . . . Under this rule the only question for the Court to determine would be: Had the Court abused its discretion?" *Sherman-Clay & Co.* v. *Searchlight Horn Co.,* 214 Fed. 99, 100 (9th C. C. A.).

The proper sphere and correct attitude of the appellate tribunal in an appeal such as the present case was more fully stated by Judge Sanborn for the Eighth Circuit Court of Appeals in *Stearns-Roger Mfg. Co.* v. *Brown,* 114 Fed. 939.

> "The primary question on an appeal from an order granting a temporary injunction is whether or not the injunction evidences an error in the exercise of its sound judicial discretion by the court which issued it. There are established legal principles for the guidance of that discretion, and where they are violated the action of the court below should be corrected. But, unless there is a plain disregard of some of the settled rules of equity which govern the issue of injunctions, the orders of the courts below on this subject should not be disturbed. The law has placed upon these courts the duty to exercise this discretion. It has imposed upon them the responsibility of its exercise wisely, and has left them much latitude for action within the rules

> which should guide them; and, if there has been no violation of those rules, an appellate court ought not to interfere with the results of the exercise of their discretion. The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action."

In order to determine how the District Court exercised the discretion which the law imposes upon it, let us consider what it is necessary for a plaintiff to show in order to entitle it to a preliminary injunction. The *three* necessary prerequisites to the grant of a preliminary injunction in a patent infringement suit were admirably set forth by this Court in *Kings County Raisin & Fruit Co.* v. *United States Consol. Seeded Raisin Co.*, 182 Fed. 59-61, as follows:

> "It is held that, to entitle the complainant to a preliminary injunction in a suit for the infringement of a patent prior to a trial on the merits, he must show three things: First, a clear title to the patent; second, its presumptive validity; and third, threatened infringement by the defendant."

Now let us see how the plaintiffs discharged this obligation.

First: Title in Peter J. Lunati, the inventor owner of the patent in suit and one of the plaintiffs, was shown; and also that Rotary Lift Company, the other plaintiff, is the exclusive licensee of Lunati under the patent in suit. Title was never questioned.

Second: The four claims of the Lunati patent relied upon (claims 2, 3, 7 and 8) had been previously sustained at final hearing in a long and bitterly contested litigation before the Standing Master and the Court for the Western District of Tennessee (the Orgill suit). The same four

claims had again been sustained on a motion for preliminary injunction by the District Court for the Western District of Missouri (the Clear Vision suit).

The rule and the law applicable to a situation of this kind are thoroughly well settled in this circuit and in other circuits.

> "It is held that, to entitle the complainant to a preliminary injunction in a suit for the infringement of a patent prior to a trial on the merits, he must show three things: First, a clear title to the patent; second, its presumptive validity; and, third, threatened infringement by the defendant. *Edison Electric Light Co.* v. *Beacon Vacuum Pump & Electrical Co.* (C. C.), 54 Fed. 679, and *Norton* v. *Eagle Automatic Can Co.* (C. C.), 57 Fed. 929. In the case last cited, Judge Hawley said:
>
> > "'I understand the rule to be well settled that where the validity of a patent has been sustained, as in this case, by prior adjudication in the same circuit, the only question open before the court on motion for a preliminary injunction, in a subsequent suit against other parties, is the question of infringement, and that the consideration of all other questions should be postponed until all of the testimony is taken in the case and the case is presented upon final hearing. There is, perhaps, an exception to this rule—that in cases where new evidence is presented that is itself of such a conclusive character that, if it had been presented in the former case, it would probably have led to a different conclusion. The burden, however, of showing this, is upon the respondent.'
>
> "In the present case the bill alleged that the validity of the Pettit patent had been sustained by the court below in three certain suits, in each of which the whole prior art was considered and expert witnesses were examined. There was no new evidence affecting the validity of the patent presented on the hearing of the application for the injunction. The sole question before this court, therefore, is whether the evidence as to infringement was such that the court below abused discretion in granting the injunction."
>
> *Kings County Raisin & Fruit Co.* v. *United States Consol. Seeded Raisin Co.*, 182 Fed. 59-61 (Ninth C. C. A.).

To the same effect see also:

Sherman-Clay Co. v. *Searchlight Horn Co.,* 214 Fed. 99 (9th C. C. A.).

Fireball Gas Tank and Illuminating Co. v. *Commercial Acetylene Co.,* 198 Fed. 650 (8th C. C. A.).

Interurban Ry. & Terminal Co. v. *Westinghouse Electric & Mfg. Co.,* 186 Fed. 166 (6th C. C. A.).

New York Filter Mfg. Co. v. *Niagara Falls Water-Works Co.,* 80 Fed. 924 (2nd C. C. A.).

Bresnahan v. *Tripp Giant Leveller Co.,* 72 Fed. 920 (1st C. C. A.).

Defendant did not set up or present to the District Court a single patent, publication or alleged prior use which related to anything differing in **kind, character or pertinency** from defenses which had been considered, and held to be ineffective by the Master and the District Court, at final hearing, in the Orgill suit and by the District Court, on motion for preliminary injunction, in the Clear Vision suit.

The alleged new defenses differ from those presented and considered in the prior suits only in the number, name and date of the patent or publication or the time and place of the use. **In substance they are identical with defenses previously considered and found wanting.**

The accuracy of this appraisal of defendant's alleged new defenses was practically admitted by defendant's counsel in the argument on the merits of the motion. During the argument the following colloquy occurred between the Court and defendant's counsel (Rec. Vol. 2, p. 695):

> "*The Court:* When you speak of this being a new defense, do you classify this device as being typical of what is known as a hydraulic elevator?
>
> "*Mr. Blakeslee:* Yes, sir. *By new defenses, I do not mean sui generis; I mean it is a new prior art, a new example of the prior art.*" (Italics ours.)

And it is further and conclusively supported by the fact

that defendant's counsel in his brief before this Court devotes practically all of his discussion of alleged new defenses to the Zimmerman patent (No. 986,888) which was before the Courts in both the Orgill and Clear Vision suits and to hydraulic passenger and freight elevators (Lyndon Sketch X and Copes Exhibit A)—of which there were numerous and practically identical examples also before the Courts in the Orgill and Clear Vision suits—and to the Wood (No. 657,148) and Appleton & McCoy (No. 1,002,797) patents which were not only before the Courts in both of these prior suits, but were also cited and considered by the Patent Office Examiners during the prosecution of the Lunati application for the patent here in suit and over which the claims in suit were allowed.

This case, therefore, does not fall within the exception mentioned by this Court in *Kings County Raisin & Fruit Co.* v. *United States Consol. Seeded Raisin Co., supra,* and by this and other Circuit Courts of Appeals in the additional citations, but rather should be treated as the Court treated the case of *Wayne Mfg. Co.* v. *Coffield Motor Washer Co.,* 209 Fed. 614 (8th C. C. A.), wherein the Court said:

> "when a patent has been sustained as a result of a final hearing, the right thus secured, except in rare cases, cannot be destroyed by a new citation from the inexhaustible storehouse of the Patent Office. *If that could be done the holder of a patent would never obtain peace.* It is impossible to judge of the merits of the patent which is alleged to anticipate, except as the result of a final hearing *where its place not only on paper, but in the industrial world can be ascertained.*" (Italics ours.)

Thus the District Court could not have abused its discretion in assuming, for the purposes of a preliminary injunction, the validity of the twice sustained claims here in suit.

Third: These claims had been held in the Orgill suit to be infringed by an automobile servicing lift essentially identical with the lift of the defendant. Again in the Clear Vision suit the claims had been held to be infringed by a lift which was practically a Chinese duplicate of the lift of the defendant.

Thus the District Court could not have abused its discretion in holding, for the purposes of a preliminary injunction, that the lift of the defendant was a "threatened infringement" of the claims in suit.

The law is clear that the finding of infringement by the District Court should not be disturbed in the absence of an obvious error of law or a serious mistake of fact. *Stearns-Roger Mfg. Co.* v. *Brown,* 114 Fed. 939, 943 (8th C. C. A.—Judge Sanborn):

> "Counsel for the manufacturing company invoke the conceded rule that, where it is not clear that the defendant is guilty of infringement, and that question is grave and difficult, a temporary injunction should not be granted on *ex parte* affidavits. *Sprague Electric Ry. & Motor Co.* v. *Nassau Electric R. Co.,* 95 Fed. 821, 37 C. C. A. 286; *Hatch Storage Battery Co.* v. *Electric Storage Battery Co.,* 100 Fed. 975, 976, 41 C. C. A. 133, 134. But while this rule prevails in all its force in the trial court, it is met in the appellate court by another of great cogency,—by the rule that where the court below has considered a question, and made a finding on conflicting evidence, its conclusion is presumptively correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts."

Plaintiffs Not Guilty of Laches—Either in Bringing Suit or in Proceedings for Preliminary Injunction.

The record shows that the defendant's infringement first came to the knowledge of the plaintiffs on January 28, 1931, and that the defendant was notified of his infringement in February, 1931. The bill of complaint was filed only five weeks later, on March 4, 1931. The bill prayed, among other things, a preliminary injunction. Defendant and his counsel indulge in some speculation that plaintiffs must—or should—have known of the infringement at an earlier date.

This speculation—which arrived at a conclusion refuted by the record—was based partly upon the false premise that plaintiffs' preliminary showing of infringement included a photostatic print of a 1928 magazine advertisement of the defendant. The fact is that the exhibit in question (Plaintiffs' Exhibit 23—Physical) is an original circular put out by the defendant. Defendant's counsel admitted that this exhibit "was a trade circular Mr. Sommer put out at the time his business became a volume business with a substantial profit in 1927" (Rec. Vol. 2, p. 737). The only other basis for charging plaintiffs with knowledge of defendant's infringement prior to January 28, 1931, is a statement made by defendant's counsel about attorneys for the Rotary Lift Company having written to the California Industrial Accident Commission in 1927 for a list of approved auto lifts used in California, a statement which defendant's counsel admitted to the District Court at the time had no foundation in the record. Thus at the conclusion of counsel's remarks the following question and answer were exchanged by Court and counsel:

> "*The Court:* Is that mentioned in one of the affidavits, you say?
>
> "*Mr. Blakeslee:* No, sir, that is purely a matter I found out today . . ." (Rec. Vol. 2, p. 743.)

But the record contains the sworn statement of Mr. O'Brien, the President of the plaintiff Rotary Lift Company, that this defendant's infringement first became known to the plaintiffs on January 28, 1931.

Three weeks and two days after the bill was filed, viz., on March 27, 1931, plaintiffs' motion for preliminary injunction and *prima facie* showing in support thereof were filed.

Thus only about *eight weeks* after defendant's infringement became known to the plaintiffs he not only had notice of plaintiffs' charge of infringement, but was under order to show cause why he should not be enjoined *pendente lite*.

Surely only *eight weeks* does not constitute laches.

Plaintiffs' counsel have been unable to find and defendant's counsel do not cite a single case where even unexplained delay between the filing of and the hearing upon a motion for preliminary injunction has been held to be a ground for denying such a motion.

And in this case whatever delay occurred between the filing of plaintiffs' motion for preliminary injunction and the conclusion of the hearing thereon is fully explained and adequately justified.

Originally the hearing was set for May 11, 1931. The plaintiffs and counsel for the plaintiffs were ready and willing and anxious to proceed with the hearing on that date. It was postponed only because of the *ex parte* and unnoticed and therefore unopposed application of counsel for the defendant. And it was only because of this initial postponement to accommodate defendant's counsel that other postponements necessarily followed.

We have endeavored to condense and summarize the complete answer to this defense of alleged laches, but after several attempts we find that the matter is as concisely stated in the record as can be done in a brief. We quote continuously, therefore, from pages 583 to 625 of Volume 2

of the record, wherein the Court had asked counsel for the plaintiffs at the outset of his argument to dispose of this matter of alleged laches, which previously had been urged upon the attention of the Court by counsel for defendant.

"Mr. Blakeslee: And then, may I suggest again that the court require the plaintiffs, as indicated by the court three weeks ago, to initially make showing to justify the some eight months during which this matter has been pending, including the three months when it was off calendar?

"The Court: It is our purpose that during the hearing of the matter at some stage of plaintiffs' presentation of it, that the plaintiffs indicate their reasons why an adjudication is warranted, in the light of any delay that has taken place.

"Mr. Blakeslee: I may say that we do not wish to attenuate this argument or proffer supererogation, but these matters do take frequently a day or a day and a half. I have known them here. There was one before Judge James here about a year ago, which I think took over one day, and even that was a case in which there had been an adjudication in this Circuit, and there never has been any such here; and we conceive this to be a very serious matter, that is, the application for ancillary relief of this sort, and therefore, in this case, which is the first in this Circuit under this patent, to very clearly go over all of our defenses. We do not wish, as I say, to impose upon the court any undue burden, but we wish simply to perform our full duty.

"The Court: We will hear from the plaintiff.

"Opening Argument On Behalf of the Plaintiffs.

"Mr. Williams: If the Court please, your Honor may recall that there have been a great many motions heard before your Honor in this suit. All of our motions, if I

recall rightly, have been met with a motion to strike, and the plaintiffs in that way have secured an opening presentation of the motion. We moved in accordance with the order of this Court entered, I think on the 26th of —June— we moved on the 2nd of October to have this motion for preliminary injunction set down for hearing on this 9th day of November. Within a week or two that was countered, as Mr. Blakeslee has said, by the defendant's motion. I believe it was to strike or expunge or something of that sort, this motion for a preliminary injunction upon the ground of the plaintiffs' alleged laches or delay in presenting it. And I was furnished with a transcript of the argument which took place upon that matter, during the course of which, as Mr. Blakeslee has suggested, your Honor said that you would at the proper time—suggesting that it be today rather than that day—wish to learn why the grant of this preliminary injunction at this time was imperative, in view of the fact that its consideration had been delayed or postponed for a period of three months, as has been suggested. And your Honor has said today that at some time—I presume your Honor says that in recognition of the fact that an application for the extraordinary relief of a preliminary injunction throws a burden upon the plaintiff and the plaintiff must carry that burden if he is to succeed in procuring the grant of the motion for preliminary injunction—and a part of that burden as I conceive it to be, is to show that there will be an irreparable injury unless the injunction be granted; and, of course, the plaintiff must show that he has such equities in his favor, among other things, the equity resulting from his diligence and celerity, I presume, in order that the preliminary injunction may be granted.

"I have made a brief outline of the matters which I wish to call to the presentation of the court, and I had in my outline followed the suggestion made by my brother, that

at the outset I take up the matter of this alleged laches. I should like to do that mainly by calling your Honor's attention to the law relative to laches, in so far as it is applicable to a situation of this kind or to a situation which, in the minds of counsel, may conceivably relate to a situation of this kind.

"In their briefs counsel have largely quoted or paraphrased a text book on the subject of Patent Law, namely, that of Mr. Walker, and listed the citations given by Mr. Walker in support of the propositions which he advances. Incidentally, I might say at this point that Mr. Walker's claim to fame as a patent lawyer rests largely upon the fact that he wrote this book. Such cases as he had, in so far as I have been able to learn, were mainly cases relating to defenses. I think patent lawyers agree that Walker's text, while brief and pointed and, therefore, easy to read, cannot be relied upon. I think his treatment of defenses of patent suits is good and his treatment of the subject of equivalents, but it is notorious that the citations given by Walker do not support his text. Perhaps that is the reason why counsel in their brief in support of their motion to strike this motion for a preliminary injunction on the ground of alleged laches cited cases which Walker cites, and the cases it seems to me do not support the defendant's contentions in the slightest degree.

I should like to call your Honor's attention to two of those cases. I have made excerpts from them which I should like to read briefly. Their first is the case of Green *vs.* French, cited by defendant. The court granted in this case a preliminary injunction, saying:

> "'The general principle of equity jurisprudence which underlies applications of this sort is, that the court will not lend its help, by way of preliminary injunction, in those cases where it appears that the complainant has acquiesced in the infringement and unreasonably delayed suit against the infringers. When

patentees sleep over their rights, without an excuse, they must not rely upon the extraordinary aid of the court when they awake from their slumbers, but must be satisfied with such relief as may be afforded by the ordinary course of practice, after final hearing.

"'The reissue on which this action is based was granted May 9, 1871. Within one year from that date the owners of the patent began a suit against an alleged infringer in the Eastern District of New York, which grew into such large proportions that three weeks were allowed and taken in the final argument, and which resulted, in 1876,' (that is five years later) 'in a decree sustaining the validity of the patent. The complainant explained his delay in the present case by showing that the suit above referred to was regarded by himself and many others as a test case,'—

and I shall want to show that we have been engaged in the trial of a test case.

'—and that he had not the pecuniary means to prosecute all infringers,'—

which is true here—

'nor was he disposed to promote litigation by a multiplicity of suits, until the vital questions raised by the pleadings and evidence in that case were settled by the decision of a competent tribunal.'

which is true here.

"'A delay in bringing actions against infringers, when satisfactorily accounted for, is not to be treated as laches. It would be a great hardship to require patentees, who are generally poor,'—

as is the case here—

'—to institute legal proceedings as soon as the infringement was ascertained or lose the right to the protection which an interlocutory injunction affords.'

"The next case is another cited by the defendant, *Collignon* v. *Hayes*. There the court granted preliminary injunction, saying:

"'The plaintiff C. O. Collignon shows that he and the other joint inventor, his brother, who died in June

1880, or he and his said brother's executors, have always owned the patent; that they have been, since 1869, making chairs with the improvements covered by it, and have never been interfered with except by the defendant; that their business in such chairs is to the extent of about $30,000 worth per year; that they have two licensees who pay them royalties; that the licensees complain of the defendant's infringement, and the licensees are endangered thereby; that he, C. O. Collignon, first learned of the defendant's infringement in 1878,'

And the affidavits here show that we learned of this instance of the defendant's infringement on the 28th day of January, 1931, on which day the bill of complaint was verified, and it was filed the 4th, I believe, of March of this year.

'—and promptly notified him to cease infringing, and has repeated such notice three times since; that soon after the first notice his brother became seriously ill and disabled from business, and it was impossible for him to give the time and pains necessary for proceeding against the defendant. It is shown that the plaintiffs retained counsel in the early part of 1880, and sued the defendant on the patent in New York City, in July, 1880, and moved for an injunction against him in November, 1880, but the suit was withdrawn because of a technical defect. The bill in this suit was filed in September, 1880, and the subpœna was served December 6, 1880. This motion was noticed for March 15, 1881, having been delayed because of business engagements of the plaintiffs' counsel. The foregoing facts are not contested.

" 'The defendant shows that he began making chairs, such as his patent describes, in September, 1718,'—

that was three years previously—

'—and applied for his patent June 21, 1879; that in September, 1879, he completed a building for the business, costing, with the land and the proper machinery, $12,000, and employs about 50 men at Cortland Village, New York, and that he is worth $25,000. What the defendant so did in respect to his new building was

> done after notice from the plaintiffs. Mere forbearance to sue, under the circumstances stated, after the notice given, cannot, in the absence of any affirmative encouragement to the defendant, be held to affect the plaintiffs' right to a preliminary injunction, in such a plain case as this is.'

"Now, the last sentence or two of that opinion hints at the underlying principle here; that is, that mere delay does not give rise to a substantive right on the part of the defendant. If the plaintiff had, by making some false representation, or had by silence when he should have spoken, misled the defendant to his detriment—I am endeavoring to quote the principle which underlies equitable estoppel—then the defendant would have some right and the plaintiffs might have lost some right.

"I have handed to your Honor excerpts from some other cases, as stating that principle upon which we rely in the presentation at this time of this motion for this preliminary injunction.

"The Court: You mean dealing with the same subject of laches?

"Mr. Williams: It does, it does, yes. I am not going to read from all, but perhaps only one or two of these cases. The others were the practical application of certain facts to motions for preliminary injunction where, despite such delays as are there noted, the preliminary injunctions were granted.

"Here, now, I want to read a case or two which discuss the doctrine of laches. I am not planning to bore your Honor with the reading of all of these authorities. Take the first case, the *Stearns-Roger Mfg. Co.* v. *Brown,* opinion by Judge Sanborn for the Eighth Circuit Court of Appeals:

> " 'The doctrine of laches is an equitable principle, which is applied to promote, never to defeat, justice. It is a branch of principle of equitable estoppel.'

And that I emphasize.

> " 'Where a patentee, by deceitful acts, silence or acquiescence, lulls an infringer into security, and induces him to incur expenses or suffer losses which he would not otherwise have sustained, courts of equity apply the doctrine of laches on the principle that one ought not to be permitted to deny the existence of facts which he has intentionally or recklessly induced another to believe to his prejudice. There is nothing of that character in this case.'

I am quoting, and I say that such is true also of our present suit here.

> " 'The manufacturing company was informed that Brown claimed its furnace was an infringement in 1893. It then had the option to retire from its manufacture and sale, or to proceed with it, and take the chances. It chose the latter alternative. Brown did not induce it to make this choice. The company made its own choice with its eyes open, and with full notice of Brown's claim, and it has ever since continued to follow it against the protest and in spite of the notice of Brown to it to desist. One who, with full knowledge of the patentee's claims of infringement, and against his protest, continues to trespass, cannot, on the ground of the estoppel or laches of the patentee, successfully defend a suit for infringement brought, or a motion for a preliminary injunction made, within any reasonable time. Repeated wilful trespasses establish no right to their continuance. And mere delay by a patentee to bring his suit or to apply for his preliminary injunction for any reasonable length of time after an infringer is informed of his trespess, unaccompanied with such acts of the patentee and such facts and circumstances as amount to an equitable estoppel, will not deprive him either on the ground of laches or of estoppel, of his right to a temporary injunction or to a recovery.'

"Now, I have excerpted and handed to your Honor, I presume some six or eight cases to the same effect, and I will turn only to the last to show that the same rule is applied and recognized in California as it is in all of the Cir-

cuits throughout the country. This case, *Brush Electric Co.* v. *Electric Implement Co.,* I believe it was, Northern District of California, an opinion by Judge Sawyer, who said:

> " 'It is, earnestly, urged, also, on the part of the defendant, that laches of the complainant in enforcing its rights against the wrong-doer, should estop it from insisting upon obtaining an injunction *pendente lite.* This doctrine of laches, as I understand it, is, generally, applicable to preliminary injunction, only. When, upon a final hearing a party, clearly, appears to be entitled to an injunction, unless he has been guilty of laches, I apprehend, that, as a general rule, the injunction, as a part of his complete remedy, would not, ordinarily, be denied on the ground of laches alone. It is quite possible, that a case may arise, where laches, surrounded and attended by other qualifying circumstances, may render it inequitable to grant an injunction, as a part of the relief afforded at the final hearing. But, if so, this is not a case of that class. When it seems apparent, as in this case, after repeated exhaustive examinations of the patents that an injunction at the final hearing is inevitable, it appears to the court that an injunction, *pendente lite,* should be granted.'

"Now, in our present case there has been no showing, no intimation of or suggestion that any conduct, either affirmative or negative, as by silence on the part of the plaintiff, has led this defendant to invest a cent, to consume time, energy, money, to do anything whatsover which could be regarded as to his detriment if the preliminary injunction motion herein be granted. That, I conceive, of course, disposes of the matter of the alleged technical estoppel by laches, and that only.

"It does not reach to the broader question of whether, in view of the plaintiffs' diligence, such as it has been, or its lack of diligence, such as is claimed to be true of it, whether the plaintiff is entitled now to an injunction and whether, in view of the fact that there was this delay from

June until the present time in the hearing of this motion, that is compatible with the contention which the plaintiff now makes, that it will be irreparably injured if this preliminary injunction be not granted; and it is to this second and broader aspect of the matter to which I wish now to address myself.

"In doing that—and I say, as I think the court understands that I mean now to convince your Honor—that unless this injunction is granted at this time there will be an irreparable injury to the plaintiff. And I shall now, to convince the court that despite the so-called delay, that the plaintiff is still entitled to a preliminary injunction just as, for the sake of argument, it must be conceded it would have been entitled to if the court had heard the matter on May 11th, when the order was originally made returnable, or upon some date in June, 1931.

"Now, to go into that matter of this alleged irreparable injury, it will conserve time and, I think, be necessary to state something of the history of this patent and of the litigation which has preceded this present suit, and of the situation in which the plaintiffs now find themselves as a result of this history and of this litigation.

"When automobiles came over the horizon some thirty-five years ago, the custom was frequently to repair those old automobiles generally at the side of the road or in the back yard, and the man who oiled or greased or repaired the car usually wormed his way underneath it in the mud or in the grass and on his back. A few years later it became the more common custom and practice to use a so-called dolly, a little board with four casters at the corners, and a man could lie on that board and wiggle himself about under the car in order to gain access to the parts requiring service or attention. A few years later it became the common practice in public garages, at least, to provide a so-

called pit; in other words, a long slim hole in the floor, four or five feet deep—

"The Court: Yes, we are familiar with the pit idea.

"Mr. Williams: —astride which an automobile could be driven, into which it sometimes fell and into which people frequently fell. It became filled with oil, dirt and grease; it was dark and generally unsatisfactory, but for the time, the best thing that seems to have been known. Still later, a few years, came so-called greasing racks, which essentially comprised a pair of elevated planks or boards, three or four or five feet up in the air, and an inclined runway by which an automobile was driven onto these boards, and then the mechanic wormed his way through the crisscross trestle work to get first at one part and then at another part of the automobile to be serviced.

"Now, as contrasted with these devices in the commercial art prior to the advent of Lunati patent in suit, it may be worth your Honor's time to step here for a moment, because I can demonstrate in a minute what this patent covers, as we have here a small model conforming exactly to the disclosure of the patent in suit.

"Mr. Blakeslee: We never have seen this; it has not been offered or identified, and we know nothing about it.

"The Court: Let it be marked at this stage as a complainant's exhibit.

"Mr. Williams: Exhibit 101 was the last one of, I do not know, how many. Is that satisfactory? We have some thirty or forty exhibits.

"Mr. Blakeslee: Merely for the purpose of illustrating the argument.

"The Court: For the purpose of illustrating the argument; Plaintiffs' Exhibit No. 101.

"Mr. Williams: I do not want to leave this here because I am interested in other cases where I shall need it.

"(Plaintiffs' Exhibit No. 101.)

"(Whereupon court and counsel retired to the far end of counsel table where demonstration of Plaintiffs' Exhibit 101 takes place.)

"Mr. Williams: An automobile requiring servicing is driven onto these rails which can be turned in any direction. The admission of fluid pressure into a cylinder in which there is a plunger lifts the automobile in that manner. The rails are open at either end, so that a workman can walk easily at this height (illustrating) under the automobile, see, repair, grease and perform whatever service may be required, wash, if he desires, the underbody of the automobile, rotate it in such a way that light strikes the parts that he wishes particularly to see. The thing occupies little room in the corner of the yard or the garage. When the servicing has been completed, the withdrawal of the fluid pressure from the cylinder, permits the rails to descend, whereupon the automobile may be driven off in the same or any desired direction. This structure corresponds, as I have said, with the disclosure of the Lunati patent, and in every essential principle with the automobile lift as manufactured and sold by Lunati's license, the Rotary Lift Company. The Rotary Lift Company--

"Mr. Blakeslee: Your Honor, I think any demonstration for the purpose of this argument should be made from the patent itself.

"Mr. Williams: I shall not be able to anywhere nearly finish my presentation in an hour or an hour and a half if there are to be too many diversions. I am willing—

"Mr. Blakeslee: I do not think that is diversion. I think that is a *sine qua non.*

"Mr. Williams: I am willing to view the model, and—

"Mr. Blakeslee: You asked to show the model, explain a model, and the patent, it seems to me, is the thing the court should see, at least with the model.

"The Court: Let us proceed now.

"Mr. Williams: If your Honor will compare the drawings of the patent with the model, I think you will find they correspond as nearly as mechanics can make them alike, as shown by the papers. The Rotary Lift Company, Lunati's licensee, has manufactured and sold these lifts with their superstructures, so-called, both of roll-on type, where the wheels ride onto these channels, and of the free-wheel type, where the automobile is driven over a pair of rails spaced not quite as far apart as are the wheels of the automobile, and where, upon the elevation of the piston, the rails engage the axles of the car. This has the advantage that the wheels are now free to be rotated for brake service or washing. There are some people who prefer this form and some who prefer that form. They are essentially alike, in that in both instances there is the vehicle supporting means, as the claims of the patent define it. Here again, upon the completion of the servicing operations the car may be lowered on the rails to the ground and driven off.

"What there is in this box is, of course, as one might suspect, the cylinder and the piston and air pump whereby we might pump up our pressure, and a tank containing oil which may be forced into the cylinder, either near the top or the bottom, in such a way as to create fluid pressure below the piston in order to elevate it.

"Now, that structure is a simple one. The drawings of the patent disclose it; the claims in suit, Nos. 2, 3, 7 and 8 define the combinations involving the piston, the cylinder, the superstructure for supporting the vehicle. Now, this combination—

"The Court: Are you finished with the demonstration?

"Mr. Williams: Yes, unless there is some occasion to revert to it, which I think there will not be. That demonstration was, on a small scale, doubtless what your Honor has seen at small service stations and garages throughout

the country. That lift, since they were first introduced, has had a tremendous commercial success. That combination of the Lunati patent, simple as it is, was an invention on what may be called the happy thought, or the happy flash order. I do not know just how, when, or where Mr. Lunati first conceived of this invention, but I am willing to concede it may have come about in some such fashion as this: Mr. Lunati, who was a garage man merely—a good one, to be sure, one who had been a sergeant in the army in France and there had serviced automobile trucks of the Commissary Department, hundreds of them—

"Mr. Blakeslee: There is no record about that, if the court please, as to his war service.

"The Court: We understand, this is just a matter of argument to illustrate some point or other, and not as evidence. You may proceed.

"Mr. Williams: Lunati may have come by this thing in this way: He may have seen a hydraulic elevator, a hydraulic sidewalk elevator or a hydraulic elevator carrying a cage or a platform to the top of a tall building; familiar, as he was, with the servicing of automobiles, familiar, as he was doubtless, with what had been used and proposed for this underbody greasing and washing, he may have seen that plunger elevator and said (snapping fingers), 'By golly! If I were just to take the cage off the top of that piston, take that platform off, leave off those guide rails that run up and down the side, and instead of that, if I were to put on there a vehicle support, a pair of rails, long slim rails with nothing in between them so it is all open under there, those rails that would come up to catch the axles of the car or the wheels, lift that up four or five feet, why, a man could walk right under there, look up to get at everything and see everything, and that would certainly be better than anything that has ever been used for that purpose before.' That may have been all there

was to it and, finally, that is about all there is to it. However he may have come by it, whether he saw a cotton bale press, hydraulic elevator, steam-engine cylinder—I don't know what—the fact of the matter is, of course, that the several elements which enter into this combination must concededly be old, each and every one in and of itself; nothing new about the cylinder, the piston, the rails, any of these things separately. The new thing is the combination. And the fact that each of the elements separately is old, of course, does not mitigate against the validity nor enforcibility of the patent. I think I can quote exactly what the Supreme Court of the United States said in defining a patentable combination, in the case of *Leeds & Catlin* v. *Victor Talking Machine Co.,* 213 U. S. 325; the court said, speaking of patentable combinations, of course, a combination is a composition of elements, some of which may be new and others old; and he emphasizes, now, 'or all old, or all new.' It is, however, the combination which is the invention and it, the combination, is as much a unit in contemplation of law as a single non-composite element.

"Now, I concede, and it is unnecessary for counsel to consume one day or three days in showing to your Honor the several elements separately of this combination in the prior art. Concededly, every one can be found there. In fact, you can find not only the piston alone, but you can find a piston in a cylinder, that much of a complete combination you can find here. You can go through the combination element by element and find every one of them in such things as hydraulic elevators, cylinder, piston and platform, all closed on top so that it won't support a vehicle in the sense of this patent, so that you can get in or under and see, not in the sense of the claim, which specifies that the rails are long or relatively long and relatively free, as the claim says, from—what is the language there—from accessories, trestle work, and one thing and another—I

forget the words, but at any rate, the claim means that the rails are free from obstructions where they will interfere with the ingress and access of a man to the underbody of a car. And, as I say, this new combination of old elements, as are most new machines, airplanes, radios, whatever you please, they are combinations, and almost invariably new combinations of old elements, and this Lunati combination is like the commonplace combination patents in that regard.

"Now, after Lunati had evolved this idea by mere happy thought or flash, as I believe, he applied for his patent, I think it was about September, 1924, showing this combination, claiming it. His patent issued the following year, in 1925. Meanwhile Mr. Lunati or some friends whom he interested with him organized the other one of the plaintiffs here, namely, the Rotary Lift Company. The affidavits show that the company was capitalized for $50,000 and, presumably, that amount of capital was paid in in cash—not more, certainly. Beginning in 1925 this Rotary Lift Company, as Lunati's exclusive licensee under this patent, began to manufacture and sell these lifts. The affidavit shows that ninety-nine of them were sold in the first year, that is, in 1925; that in the next year, 1926, nine hundred odd were sold; in the next year, a thousand odd; in the next year, thirteen hundred and something; in the next year three thousand two hundred and something. That is the last year, 1929, referred to explicitly in the affidavits. The sale of those things, where a heavy automobile was shot up on the end of a little piston, four or five feet in the air, was not easy of accomplishment at the outset for reasons which I think will be obvious. People were inclined to suspect the efficacy and the safety of such a contrivance, but with the demonstration of the successful operation of ninety-nine the first year and of nine hundred the next, the fact is that these automobile servicing lifts, these simple

devices such as I have explained, have come to replace every other known means for performing such a servicing of automobiles. Some people, to be sure, get along with none. In fact, they crawl on the ground or the floor. There are some pits which still survive, but I think it is safe to say that no one now builds a new pit or a new rack, and that when any device of any kind now which is installed or built for the underbody servicing of an automobile, it is this device and no other.

"I cannot—of course, there is a limited field, a limited market for the sale of these things, but within that field I do not think it is possible to conceive of any new device which has more completely swept that field than has this Lunati lift in the field of automobile servicing. The pioneer work was expensive. Ninety-nine lifts won't support a manufacturing company. The Automobile Rotary Lift Company, as it was then named, was obligated by its contract with Lunati to pay him royalty of $50 on each lift that it sold, and it paid that. Later that royalty was reduced to $26 and it paid those royalties to Lunati. Still later that royalty was reduced to $10.40 per lift and it paid those royalties; and it was, of course, handicapped, as compared with others, by its obligations to so pay these royalties. It became an element of cost or expense which the Rotary Lift Company had to meet.

"Now, as usually happens when someone invents a new electric sign or radio, or what you please, that immediately evokes such widespread and general speed of adoption, to the exclusion of everything else, why, there jump into the field a perfect horde of bootlegging infringers. I am not using the term 'bootlegging' opprobriously, I do not mean to say that. These concerns that went into the manufacture of these devices are what, in the jargon of the patent lawyers, are commonly called 'pirates.' I call them boot-

leggers instead, but they were concerns, at any rate, which had no patents of their own; concerns which had contributed nothing to the evolving of this idea; concerns which had contributed nothing to the missionary work which had disseminated these devices throughout the country to a limited extent, but to an extent sufficient to satisfy the automobile servicing world, that here at last was the thing to do the business. And to compete with this little $50,000 company of Mr. Lunati's, there came into the field, for example, the Curtis Manufacturing Company of St. Louis, a concern thirty or forty or fifty years old, engaged throughout that long life in the manufacture and sale of pneumatic and fluid pressure operating hoisting equipment and air compressors for use in conjunction therewith, a concern capitalized at some millions of dollars, enormous factory, enormous sales force, they began to manufacture and sell automobile lifts following in every essential respect these lifts exactly, to an extent such as I think undoubtedly they were, as was the defendant's here, copied from seeing one of the plaintiffs' lifts. There embarked in this business such concerns as the Lacer-Hallett Corporation of Los Angeles, an old established concern in the sale of garage equipment, and represented by Mr. Parke who is here today, and Mr. Dustman, the president of the company is here—I hope he won't feel too badly if I call his company one of these pirates who embarked in this infringement of this device. There was the American Chain Company which for years sold the Weed chain, with which every automobilist is familiar, a concern capitalized at some tens of millions of dollars, and so on; I might name others. These were the concerns, and such were the class of concerns that embarked in this competition with Mr. Lunati and his little company.

"Now, despite the fact that that company had had to

expend its resources in making lifts, in advertising lifts, in doing the missionary work necessary to sell one here and one there, and the work necessary to convince people that these simple devices would do the trick, in addition to the expenditures which it had had to make along those lines it had heavy patent expenses to meet, not only in the form of royalties, but in expense of litigation because the spirit of this Rotary Lift Company was not daunted, although it did not have vast sinews of war when the Curtis Manufacturing Company, the oldest and strongest company up to that time entered the field, why, Lunati and the Automobile Rotary Lift Company brought a patent infringement suit against the Curtis Manufacturing Company, or, rather, against a concern in Memphis, Tennessee, known as Orgill Bros., a jobber there, which happened to be the home of Mr. Lunati and the Rotary Lift Company and where, obviously, the suit could be conducted at less expense to them than if they had gone into some more remote district. That suit, as shown by the record and by the ultimate decree, was defended, not by the relatively disinterested jobber, Orgill Bros., but by the Curtis Manufacturing Company; and they retained for the defense of that suit one of the most respected and one of the ablest patent attorneys and young men in this country, Mr. Paul Bakewell of St. Louis. The trial of that case was referred to a Master, with an order to report both the law and the facts, and the trial of that case occupied ten days or eleven days of the Master's time, after which elaborate briefs were filed and eventually an elaborate report by the Master; made the subject of exceptions to the court, a two or three day argument before the court resulted in confirmation of the Master's report and the entry of a decree holding claims 2, 3, 7 and 8, which are the claims here relied upon in this Lunati patent, to be valid and to be infringed by the lift

which had been manufactured by the Curtis Company and sold by its jobber Orgill Bros.

Now, that litigation against the Curtis Company, instituted, as I recall it, in June of 1928, resulted in this hearing before the Master in January, 1929, and Master's report in about May or June, I think it was, of 1929, and opinion by the court in August of 1929, and the entry of the interlocutory decree holding the patent valid and infringed on October 9, 1929.

"The Curtis Company, or the defendant, appealed from that decree, but before the appeal was very far advanced the Curtis Manufacturing Company approached the Rotary Lift Company and applied for a license under this patent. Negotiations were had which resulted in the granting of a license to this powerful competitor, the conditions of that license being, among other things, that the Curtis Company should pay a royalty at the rate of $20 per lift. These lifts sell at a price averaging about $200 each. The appeal was, of course, then dropped; it was not further prosecuted, with the result that the interlocutory decree became final as of November 18, 1929. Meanwhile, of course, other of these large infringers, these powerful concerns had come into the field to make and sell substantially identically the same devices. A second one of, perhaps, only second prominence at that time was the Oildraulic Company of Memphis. It sold those lifts through a big marketing concern, automobile garage marketing concern known as the Marketing Company of Minneapolis.

"Mr. Blakeslee: If the court please, that is not pleaded in the complaint, and the established rule is that prior litigations of a patent which are not pleaded shall not be considered on a motion for preliminary injunction. I can show the court that law, the purpose being that plaintiff may have notice wherefrom to investigate,—

"Mr. Williams: If the court please, that goes—

"Mr. Blakeslee: —any other cases. The only one pleaded is this Orgill-Curtis Company's, which counsel is referring to.

"Mr. Williams: If the court please, this suit that I now refer to, the one against the Oildraulic Company resulted only in a consent decree. Now, we do plead that there has been a general acquiescence in this patent and an acknowledgment of it, by virtue of the many licenses which have been granted to powerful concerns. Counsel is right in saying that upon motion for preliminary injunction, in so far as it rests upon a prior adjudication at final hearing must rest and does rest upon the one in the Curtis suit, but when it comes to the matter of general acquiescence, our affidavits do refer to these licenses granted to these many other concerns; and the history leading to the granting of these licenses, that is the matter to which now I address myself and that, as I expect any moment to show, is the most important aspect of the irreparable injury with which we are concerned here.

"I do not want the court to misunderstand me, and I will say once and for all, therefore, that the only adjudication at final hearing is the one in the Curtis case which should be alluded to. There was, then, this suit commenced, the preparation for it commencing almost immediately after the entry of the final decree in the Curtis case on November 18, 1929, the preparation for a suit against the Oildraulic Company. That suit was filed, if I recall rightly, on the 19th of February in the following year. That would be four or less than four months after the termination of the suit against the Curtis Company. A suit was commenced against the Oildraulic Company. The Oildraulic Company came to the Rotary Lift Company, proposed to take a license. The record in the suit shows here that a consent decree was entered in favor of the plaintiffs, holding again this patent to be valid and infringed; and I

do not emphasize that, of course, as the legal prerequisite to the grant of the preliminary injunction here. I do stress the fact that this second largest concern, the Oildraulic Company, acquired a license under this Lunati patent in the latter part, I think it was, of February or early in March of 1930 and terminated the suit by the entry of a consent decree, the license again providing for the payment of a royalty to the Rotary Lift Company of $20; and that was at a time when the Rotary Lift Company was obligated to pay Lunati a royalty of $10.40 per lift.

"The Court: Let us see, that was a suit against what company, again?

"Mr. Williams: The Oildraulic Lift Company, O-i-l-d-r-a-u-l-i-c, a coined name; Oildraulic Lift Company. And the important point, I say, is that they took license, not that they consented, because that should have no probative force here, not that they consented to a consent decree, but that a consent decree was entered. That, I say, was in February of 1930, and as I go along I want your Honor to see how diligent we have been in prosecuting these infringers.

"Infringements had been commenced by another concern named the Joyce-Crittland Company of Dayton, Ohio.

"The Court: What is that again?

"Mr. Williams: Joyce-Critlland Company of Dayton, Ohio, J-o-y-c-e hyphen C-r-i-t-l-l-a-n-d Company of Dayton, Ohio. That was an old, old manufacturing concern, worth several hundreds of thousands of dollars, engaged in the manufacture of hydraulic lifting devices for use in and about railways and railway repair shops. They had taken the manufacture and sale of a lift for automobile servicing substantially identical with those of the plaintiffs' here, and they were sued, as I recall it, on the 7th of April, 1930. That was, I think, less than two months,—about five or six weeks after the termination of the suit brought against

the Oildraulic Company. And at about the same time two suits were brought against jobbers or users of lifts made by the Globe Machine and Manufacturing Company of Des Moines, Iowa; one against the Mitchell Goldbert Sales Company of New York, and another against a jobber in Memphis whose name escapes me—the Mills-Morris Company of Memphis, Tennessee.

"In these suits, as we later learned, there was a considerable consolidation of defense interests; that is, there was a good deal of assistance, moral, at least, and counsel, and I think contribution of money back and forth to assist in the defense of some of those suits for the benefit of all of the defendants, with the result that upon a motion for a preliminary injunctiou there was a suggestion that some depositions be taken, which were taken; and, in fact, many depositions were taken. That thing ran along very, very actively from the time the suit was filed on April 7th until the summer of 1930.

"Mr. Blakeslee: All those matters, if the court please, are not in the showing. We have no opportunity, nor have we had, to test them out or confirm them or prepare to deny them; and I think if counsel is proposing to argue this matter in an hour and a quarter or an hour and a half, he should at least speak to the matters which are before us and which we have had a chance to test and investigate.

"Mr. Williams: Why, there is reference to the commencement of these suits and the disposition of them.

"Mr. Blakeslee: All these matters are not in the complaint, nothing about all these things whatever.

"Mr. Williams: I agree that counsel is right that the bill of complaint does not tell this story; of course not. The affidavits do.

"Mr. Blakeslee: No such showing.

"Mr. Williams: The affidavits do.

"The Court: May we suggest, the court will find it diffi-

cult to follow the argument if there is a continuation of these interruptions. We should like at least to hear both sides, but to hear them in some logical sequence.

"Mr. Williams: I, perhaps, am dwelling a little unnecessarily in detail upon the course of procedure in my reflections as to what happened, but the gist of the matter there is, which the affidavits certainly set forth, that in the summer of 1930 after very active skirmishing, this Joyce-Critlland Company approached the Rotary Lift Company for a license, as did also the Globe Company and as did also at the same time, or in association with these gentlemen, Mr. Dustman's company here, the Lacer-Hallett Company of Los Angeles, and the Easy Auto Lift Company of San Francisco. There were some accretions to the list, I think, as the negotiations proceeded and, I think, included ultimately also the Hollister Whitney Company of Quincy, Illinois, and U. S. Air Compressor Company of Cleveland, Ohio. It is possible that I have failed to name some one. Do you recall, Mr. Dustman, if I named them all? At any rate, the new ones with the old ones made a bunch of eight big, strong manufacturing concerns who applied to the Rotary Lift Company for sublicenses and to whom sublicenses were granted, now under a changed condition as to royalty. No more $20 per lift, but now at the rate of $10 per lift, out of which $5.20 per lift was paid to Lunati, which he agreed to accept in lieu of the $10.40 which he formerly had had, and the $4.80 going into the pockets of the Rotary Lift Company, and in the hope that it might meet the expense of some of the litigation which has ensued since.

"Now, those licenses to those eight concerns—of course, the Curtis license was modified so that it paid now the $10 instead of the $20, and so also the Oildraulic—those licenses were granted on the 5th of January, 1930. And I can tell your Honor, not because it is in anybody's affi-

davit, but because anybody would know it if he reflects about it for a moment, that I was a very active negotiator with and for the Automobile Rotary Lift Company between the summer of 1930 and January 5, 1931, when nine separate and distinct corporations and their officers—I say nine because the Rotary Lift Company was, of course, one party to the negotiations—were reconciled as to a form of license mutually binding upon both and satisfactory to all. I felt on the 5th of January when that was signed that I had really accomplished a good deal during the six months which intervened between the first approach of the Joyce-Critlland Company and the execution and delivery of those licenses.

"Now, I come to the thing that I cannot too strongly emphasize for the purposes of what I shall have to say a moment later relative to this matter of irreparable injury and the plaintiffs' imperative need of a preliminary injunction now. Here was this little Rotary Lift Company into which $50,000 had been put and an idea, and which had been carrying on this litigation against these million dollar corporations one after another, after another, after another, exhausting and depleting its resources in the missionary work necessary to sell the first ninety-nine lifts and then to sell the next nine hundred lifts. The company has never paid one dividend up to this day, never one.

"I emphasize now the facts as to the form of the sublicenses which were eventually agreed upon and executed, and of which a copy is on file here in answer to some interrogatory. Those sublicenses, of course, had to meet this situation. That there was the Rotary Lift Company which had done this pioneer work, made the expenditures, had only $50,000 to start with, never paid a dividend, it must be protected—

"Mr. Blakeslee: If the court please, I do not want to interrupt but—

"The Court: Now may the court offer this suggestion: We prefer that counsel avoid further interruption. We shall indicate when we desire to hear from counsel.

"Mr. Blakeslee: I do not think that counsel should state matters that are not in the record.

"The Court: Just a minute. This court will insist upon counsel refraining from further interruption.

"Mr. Blakeslee: Does the court require that I then mention every misstatement that is not competent in the record?

"The Court: No, no, that is not an argument. It is not presentation of any evidence, hence we ask that you refrain from further interruption.

"Mr. Blakeslee: I will point out every departure from the record later.

"Mr. Williams: Those sublicense contracts had to protect, naturally, the Automobile Rotary Lift Company against what the Curtis Company might do. That is a matter of common sense. No affidavit says anything about it, but the record does show that the sublicense contract entered into made this provision: That the Automobile Rotary Lift Company as then known—its name now has been changed to Rotary Lift Company—should have the right to name, fix the price at which these lifts should be sold and to make out a schedule of those prices and promulgate those prices to all of its sublicensees; and the sublicensees obligated themselves, as also did mutually the Rotary Lift Company, not to sell lifts at prices less than those so scheduled and promulgated from time to time, upon 60 days' notice by the Rotary Lift Company. That is one point that I stress. That document is a long printed book, thirty pages as I recall. I stress that point. I stress the fact that all of the sublicensees were obligated to pay royalties to the Rotary Lift Company at the rate of $10 per lift, but most of all I stress this point, and it was a thing which these powerful concerns were in a position to demand

certainly—I think to compell—at any rate, the contract when entered into gave to each and every one of those sub-licensees the right absolutely at the expiration of two years, or any time thereafter, to cancel the license for any reason or for no reason, and it provides also that if and when the licensee so cancelled, he should then be free in any suit or proceeding alleging infringement to make any and every defense whichever he might have made—no estoppel.

"Now, why was it? Why was it that we acceded to that rather compelling demand? We had a patent which had been adjudicated. Many of these people thought they had new or other or different defenses which might or might not be good; that some day somebody might have or find some defense or might have a case before some court to whom this patent would appeal as not being a good one, it might be invalid. Then, of course, these concerns did not want to be left with the obligation of having to pay royalties and maintain a minimum price in competition with other people who might be free to make such prices as they chose and who could compete without the obligation of paying any royalty.

"Now, why was it that I, as counsel for the Rotary Lift Company—perhaps it would be more proper for me to inquire: Why was it that the Rotary Lift Company consented to enter into such license contracts as this? Well, here again, the affidavits do not answer the question, but I think common sense does. The Rotary Lift Company, with its little $50,000 of capital spent in this pioneer work, could not have afforded to litigate all those big concerns one after another. It just could not have done it. And, furthermore, I told Rotary Lift Company—and I think I had a right to—certainly, they followed my advice—that I had faith that the federal courts of the United States could be relied upon to enforce the law, and what I meant by that was this, and I almost can quote: The law is and

the courts say it is a controlling principle of equity jurisprudence—I want to read one of the cases so there will be no mistake about it, in a moment—that where the circumstances are such as they are in this case, then a preliminary injunction and the grant of it becomes a matter of right to the plaintiff, to be granted to be sure, in the exercise of a judicial discretion by the court, but upon circumstances such as this record and history presents, it is a matter of right, and with that right, unless there be some new defense which convinces a court that, had it been presented in the earlier case, it must have availed to a contrary conclusion, I relied upon the law which says that preliminary injunctions will be granted.

"Now, when does that two years of time expire? That two years expires two years from the 5th of January, 1931. That is a little more than a year from now, fourteen months. If, within that interval of time, the Rotary Lift Company can afford to its licensees a large or a substantial measure of protection and security, those licenses won't be cancelled; and if we cannot, if we cannot secure injunctions, why, those licenses almost inevitably must be cancelled. I could not find fault with Mr. Dustman of the Lacer-Hallett Company, if at the end of that two years, they were to cancel if this and other preliminary injunction motions cannot, under the law, be granted and relied upon as to being granted, for this reason: Here is the Lacer-Hallett Company right here in Los Angeles selling a lift under our patent, under our license, under a contract which obligates it under a penalty, I think at the rate of $100 per lift if it violates, to sell its lifts at not less than the minimum price which we establish; and for a lift of the kind sold by the defendant here, that price is, as I recall it; $192.50 plus its freight charge of $20—net $192.50. Here on the other street in Los Angeles is Herman Sommer selling substantially the same identical article at $180, $160,

$120, I don't know, at any low price that he finds it necessary to make in order to sell his lift; and, furthermore, the Lacer-Hallett Company is obligated by its contract to incur for each of its lifts the added cost of $10 in a royalty, and here is Mr. Sommer with no obligation to pay that $10. And, of course, that situation here in Los Angeles is duplicated in the case of the Easy Auto Lift Company at San Francisco, another licensee which has to meet two parties that we have brought suit against there, Foster Bros. (?) and American—I forget its exact name—in Tacoma, Washington. And so I may go into Kansas, for example, where there were infringements by the Pioneer Company, K. & M. Supply Company, against whom we brought suit and who consented to the entry of decrees very promptly after suits were commenced. Also, that is in the field or territory of one of our licensees, the Curtis Manufacturing Company. Another one in Des Moines, Iowa, the Globe Manufacturing Company, up in about Kansas City, Missouri, and Kansas City, Kansas, where these three or four infringers were, one of them the Clear Vision Pump Company, against whom we brought suit for infringement on this patent in about March, I think it was, of this year and against whom we argued a motion for a preliminary injunction in April of this year, and wherein Judge Reeves rendered an opinion in September, late in September of this year, granting the preliminary injunction. And here, if your Honor is interested, is the copy of Judge Reeves' opinion granting that motion for preliminary injunction, and thus relieving the Curtis Company and the Globe Company in that territory from the infringement of this patent and the competition of these unlicensed concerns.

"That situation which the Lacer-Hallett Company confronts here is, in substance, duplicated all over the country. Now, I say that if these licensees cannot be relieved of this unbridled and unrestricted competition of such free-

lances as Sommer, as he now is, why, they are inevitably going to cancel these licenses the first possible opportunity. They have given us two years to prove that we could afford them protection. If we cannot, they are going to cancel those licenses and then they are free to defend on any and every ground. Now, this little Rotary Lift Company and Lunati simply cannot afford the cost of litigating against those and all of these other concerns, particularly not if it is deprived of royalties, and the net result will be this if we cannot here and now in this district, and about now in some other distant districts, procure the grant of these preliminary injunction motions: That the resources and substance of the Rotary Lift Company will have been so far dissipated in an effort to maintain what the courts have uniformly held to be its rights, it will so far have dissipated its resources that it simply will have to go out of existence.

"Now, it is all very well for counsel to suggest in this case and in all of these cases, as is always done, that the defendant is responsible in damages, got lots of money. Sommer claims to have $111,000, I believe, net worth, damages which we may possibly recover a good many years from now after spending probably more than the damages amount to in litigating to a point where we have a judgment, but the simple plain fact of the matter is that the Rotary Lift Company can't last long enough ever to prosecute any case to a point where a judgment for damages can be had, unless meanwhile it has such protection as we are asking for here and now. And I say that that indicates, at least, the kind of irreparable injury which I think should appeal to the court as against the equities urged on behalf of the defendant, to the effect that Mr. Sommer has this nice business, partly in these lifts and partly in air compressors and partly in greasing equipment and partly in automobile washing equipment, and to sell all of

which, he says, is in some way enhanced and fostered by the fact that he is selling these highly desirable lifts under the Lunati patent, or infringing, as we claim, the Lunati patent.

"I did not want to spend all of my time in emphasizing the character of the situation of the undoubtedly irreparable injury which we will suffer and which no amount of damages can—well, I won't say that 'No amount of damages' can ever be paid, but it is perfectly evident to me that no amount of damages can ever be recovered by that little concern unless meanwhile it has the protection to which I think the law clearly entitles it.

"Now, one other word and I shall have finished with this matter of irreparable injury and diligence. I think we have shown diligence—

"The Court: We shall be obliged to take a recess at this time. Will counsel indicate how much further time will be required on behalf of the complainant?

"Mr. Williams: I have taken how much, an hour and ten minutes?

"The Court: Approximately that.

"Mr. Williams: I can't finish, I am afraid, in five minutes more. I think I could in twenty.

"The Court: We will take a recess until 2 o'clock.

"(Whereupon, an adjournment was taken until 2 o'clock P. M. of this day.)

"Afternoon session, 2 o'clock.

"Mr. Williams: Assuming that the plaintiff was entitled to a preliminary injunction in June of this year, counsel for the defendant referred this morning, as he did three weeks ago or four weeks ago today, to a circumstance which he urges as depriving the plaintiff of that right on this 9th day of November. The circumstance to which counsel alludes is only one of two closely concomi-

tant circumstances, the other one of which is never alluded to by counsel in so far as I have been able to hear him or to read the transcript of his presentation three or four weeks ago; and it seems to me that the one, at least, completely vitiates the effectiveness of the other if, indeed, it does not controllingly supersede it in importance. I think I have said to your Honor that the plaintiffs first learned of the defendant's alleged infringement on the 28th of January, 1931. The bill of complaint in this suit was filed five weeks later, on the 4th of March, 1931. This motion for a preliminary injunction was filed on March 27th, three weeks and two days later, March 27, 1931; and at that time the court entered an order upon the defendant to show cause why the preliminary injunction should not issue and made that 'show cause order'' returnable on the 11th day of May, 1931.

''Now, on or about the 2nd day of April—of course, first, that order to show cause fixed times when reply affidavits were to be filed, the defendant's affidavits and the plaintiffs' affidavits—on or about the 2nd day of April the court entered an *ex parte* order, an order which was procured without any consultation with any representative of the plaintiffs and without any notice whatsoever to the plaintiffs, and that order reads as follows:

> '' 'Good cause there unto appearing, it particularly appearing that Raymond Ives Blakeslee has been retained.'

and so on, and as the order says,

> 'has initiated extensive work in preparation for said motion and the defense of this cause, including investigation of prior art, and requires ample time for a full consideration of this case and the papers and files therein'—

all of this was, of course, more than six weeks prior to the return day of the order on May 11th, and then he says, or the order says or recites:

> " 'That he is required to be in attendance in the United States Circuit Court of Appeals in the Tenth Circuit at Wichita, Kansas, the middle part of April, 1931,'

a month before the return day,

> 'and he has engagements east of there during the next week. Having so represented to the court and having represented that no proper and suitable time remains for preparation of opposition to the said motion for preliminary injunction in conformity with the times now provided by order of this court, it is hereby ordered,'

and then the return day of the order was postponed to June 1, 1931, and the times for filing affidavits were correspondingly postponed and extended.

"Now, as it happened—and this was all later made a matter of record here—I, who had been the one actively or active in all of this long line of litigation that I have referred to for the plaintiff, it happened that when the order to show cause was procured my associates were fully informed as to my engagements, and the return day for that 'show cause order' was made to conform with my freedom to be here to present the motion. And it was upon the basis of that information—I don't know what was said between my associates and the court, but certainly the day then fixed, May 11th, fitted in with my engagements in such a way that I could have been here, would have been here and was anxious to be here to argue that motion. It was not, of course, until some days after this *ex parte* order had been entered—and I am not referring to this by way of complaint about the entry of this order, nor even of the fact that it was entered without notice or without consultation—what I do emphasize is this: I had a case involving ten patents which had been pending for a long time in the United States District Court for the Eastern District of New York in Brooklyn. The calendar in Brooklyn was

such that there were some eighty cases in advance of my case when the calendar was called on the 6th, I believe it was, of May, 1931, and due to the depression or for some reason, almost all of those cases evaporated without trial and precipitated the trial of my case, which was about the eightieth or eighty odd on the list, very much to my surprise, to be sure. The court learning that that was a long case which, as it eventuated, took fifteen or sixteen days of trial, peremptorily set the case for trial on a day certain, the 25th of May. As it happened, the trial commenced upon that day and continued until it was concluded; there was a slight interruption over a week-end, but it was concluded on the 10th of June, 1931. That made it impossible for me to appear here in support of our motion, or even to prepare, following the extended time for the defendant's papers, for the hearing of that motion on the 1st of June which was the postponed day to which the case was continued by this *ex parte* order.

"Now, this also had happened and this is set out in full in an affidavit which a little later was filed in support of the plaintiffs' motion for a continuance or postponement of the hearing on this motion for a preliminary injunction: For the past seven or eight years I have been afflicted with cataracts on both of my eyes. Those things had developed to a point where, beginning about three years ago, it had become impossible for me to read anything at all. An operation to correct those cataracts had, for medical reasons, to be postponed until the time was ripe for a series of operations, and I had learned in about the middle of this last spring that the time had arrived when those operations could be performed with a fair likelihood of success. Accordingly, I had made all of my plans, all of my engagements, and I had not a few, in such a way that I could devote this last summer to that surgical work.

"(Short interruption.)

"I went to Johns Hopkins University in June, I believe it was, for the final examination which led to the operations, the first of which occurred in accordance with these prearranged plans on the 22nd of July. They kept me in the hospital there for about three weeks, then I was out for a time, under injunction not to do any work at all. I went back late in July—no, late in August, and had another operation performed which kept me there again for some two weeks, and then I returned again in October; and it was not until the 13th of October that I was supplied with glasses because, after these operations, one cannot see anything more than light without glasses. It was on the 13th of October that I was given a pair of glasses and then it was, for the first time in three years, that I was able either to see one well enough to recognize him or able to read anything at all.

"Now, the precipitation of this trial in Brooklyn on the 25th of May and its continuation to the 10th of June interfered completely with some other court engagements which I had had to make for that interval and for the time immediately following that, with the result that I had to procure postponements of those other engagements and take care of them during the middle weeks of June. All of these matters are referred to in the affidavit which I sent to my associate here and which he presented to the court, in conjunction with a motion to have the hearing of this motion for a preliminary injunction continued more or less indefinitely and under an order which the court made, whereby either party might call up the motion for disposition ninety days hence—that would be late, I think, in September, any time following the end of September, and for hearing, I think it was upon thirty' days or twenty days, notice—twenty days' notice, I believe. The papers do not allude to the fact that I had long planned to be married on

the 6th of June, and I refer to it only because I do not want anyone to think I am concealing any of the facts which may have motivated me—I had planned to be married on the 6th of June. The trial in Brooklyn interfered with that. I was married on the 27th of June. I did take a hurried, much curtailed trip to Europe which took exactly three weeks from New York back to New York, but on the day I got back to New York I went to Johns Hopkins Hospital and I have been either there or hovering about there from that time until the 13th of October. It was in anticipation of the success of these operations that, on the 2nd, I think it was, of October of this year, we served notice to move for the setting of the hearing on this motion on the 9th day of November, although that date may have been fixed in part by the court. I am not sure that I recall.

"To summarize that matter, the facts are these: The plaintiffs and the plaintiffs' counsel were ready, able and anxious to present this motion on the 11th day of May, at which time it was set. The postponement of the hearing from that date to a date in June at the instance of counsel for the defendant upon this *ex parte* application, and where we had no notice nor even opportunity to suggest that some other date would be necessary in order to meet the needs based wholly upon a court engagement at that time, there was no such opportunity, as I say, and the postponement of the hearing from the 11th of May until this date in June was the reason, the controlling reason and the only reason why this motion could not have been presented earlier than it is now being presented.

"Now, of course, it puts me in a somewhat embarrassing position to say to the court what is true, that this later postponement covering this summer period was to accommodate me. It goes without saying that it accommodated me in a matter which was almost vital to my professional

career, to say nothing of my happiness. I think the cause for the requested postponement was of as much weight and importance there, possibly as the reasons given by counsel for the defendant for asking for the first month's postponement. He had an engagement in the court in Kansas a month in advance of the date set for the argument; he had other engagements, he says not what, further east on—

"The Court: The court will interrupt here to say there is no occasion for going into any further detail on this feature of the case.

"Mr. Williams: I do not wish to go further. Your Honor means the circumstances for these delays?

"The Court: Yes.

"Mr. Williams: I take that, it, you mean on this question of laches or delay generally. If you do not want to hear more about that, I won't say anything.

"The Court: No.

"Mr. Williams: Then I am taking up my third point now. Does the court wish to hear this other matter, or is that ready?

"The Bailiff: No.

"Mr. Williams: It is not ready?

"The Court: No, government's counsel is not here.

"Mr. Williams: Very well. Now, I shall devote a few moments to the other merits of the motion for preliminary injunction. . . ."

Sept. 1, 1925 P. J. LUNATI 1,552,326

LIFTING DEVICE FOR MOTOR VEHICLES

Filed Nov. 28, 1924

Fig. 1.

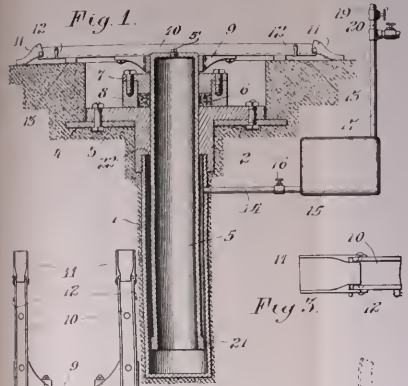


Fig. 3.

Fig 4

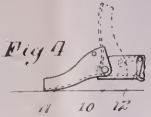
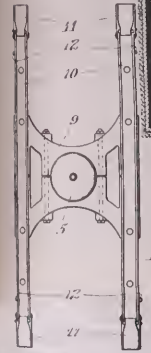
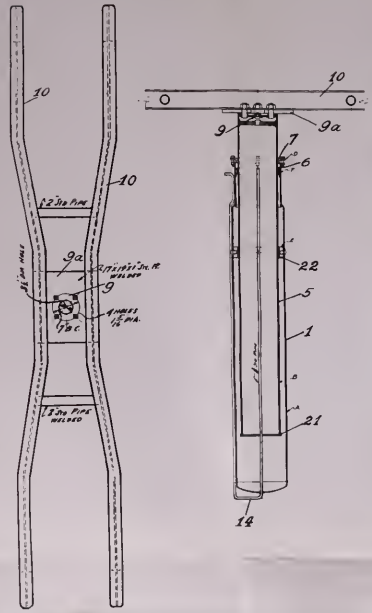


Fig 2.

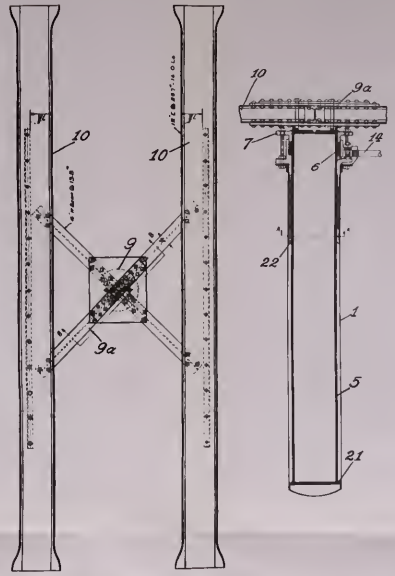


Inventor:
Peter J. Lunati,
By John H. Talley
Atty

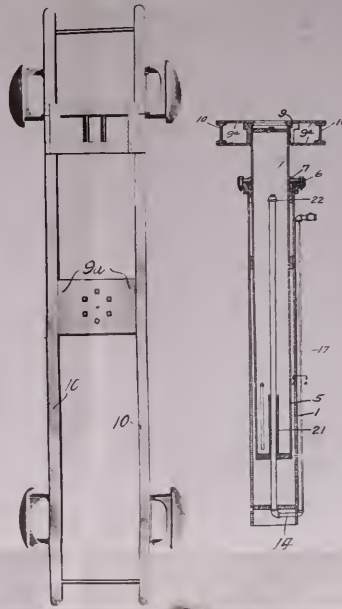
Defendant's Comwel Hoist



Curtis Lift held to infringe Lunati Claims 2,3,7 & 8 in Orgill Suit



"Clear Vision Hoist" held to infringe Lunati Claims 2,3,7 & 8 in Clear Vision Suit



The Doctrine of Laches Is An Equitable Principle, Which Is Applied to Promote, Never to Defeat, Justice. It Is a Branch of the Principle of Equitable Estoppel. Where a Patentee, By Deceitful Acts, Silence, or Acquiescence, Lulls An Infringer Into Security, and Induces Him To Incur Expenses or Suffer Losses Which He Would Not Otherwise Have Sustained, Courts of Equity Apply the Doctrine of Laches on the Principle That One Ought Not To Be Permitted To Deny the Existence of Facts Which He Has Intentionally or Recklessly Induced Another To Believe To His Prejudice. There Is Nothing of That Character in This Case.

Numerous decisions might be cited to show that delay such as of necessity occurred in this case is not laches. We shall, however, content ourselves with a quotation from but one authority, *Stearns-Roger Mfg. Co.* v. *Brown,* 114 Fed. 939 (8th C. C. A. 1902). In that case it appears that the patent in suit was issued March 22, 1892. In May, 1893 the patent owner notified the defendant or its predecessor of infringement. On January 4, 1897, plaintiff brought suit against another infringer, which suit terminated successfully for the plaintiff on October 8, 1900. The bill in the reported suit was filed April 24, 1901. The defendant charged laches in opposition to plaintiff's motion for a preliminary injunction. In passing upon this defense Judge Sanborn, speaking for the Eighth Circuit Court of Appeals, said:

> "It is contended that the complainant was guilty of such laches that he was not entitled to a preliminary injunction. The patent in suit was issued on March 22, 1892. In May, 1893, the owner of the patent notified the manufacturing company or its predecessor that its Pearce furnace was an infringement, and in June that charge was denied. On January 4, 1897, Brown brought his suit against the Metallic Extraction Com-

pany, in which, after a protracted and expensive litigation, the validity of his patent was finally established on October 8, 1900. *Extraction Co.* v. *Brown,* 104 Fed. 345, 43 C. C. A. 568. The bill in this suit was exhibited on April 24, 1901. The doctrine of laches is an equitable principle, which is applied to promote, never to defeat, justice. It is a branch of the principle of equitable estoppel. Where a patentee, by deceitful acts, silence, or acquiescence, lulls an infringer into security, and induces him to incur expenses or suffer losses which he would not otherwise have sustained, courts of equity apply the doctrine of laches on the principle that one ought not to be permitted to deny the existence of facts which he has intentionally or recklessly induced another to believe to his prejudice. There is nothing of that character in this case. The manufacturing company was informed that Brown claimed its furnace was an infringement in 1893. It then had the option to retire from its manufacture and sale, or to proceed with it, and take the chances. It chose the latter alternative. Brown did not induce it to make this choice.

"The company made its own choice with its eyes open, and with full notice of Brown's claim, and it has ever since continued to follow it against the protest and in spite of the notice of Brown to it to desist. One who, with full knowledge of a patentee's claim of infringement, and against his protest, continues to trespass, cannot, on the ground of the estoppel or laches of the patentee, successfully defend a suit for infringement brought, or a motion for a preliminary injunction made, within any reasonable time. Repeated willful trespasses establish no right to their continuance. And mere delay by a patentee to bring his suit or to apply for his preliminary injunction for any reasonable length of time after an infringer is informed of his trespass, unaccompanied with such acts of the patentee and such facts and circumstances as amount to an equitable estoppel, will not deprive him, either on the ground of laches or of estoppel, of his right to a temporary injunction or to a recovery. Moreover, delay in prosecuting other infringers during the time while the validity of a patent is in litigation does not constitute laches."

Defendant made no showing whatever that he had been misled in any way by the delay from June 29th until October 2nd of the hearing on the motion for preliminary injunction or that he might be or was injured in the slightest degree by this delay or that his status was in any wise altered during or because of the delay. The only party who suffered injury was the plaintiffs. Certainly these facts do not deprive the plaintiffs of their rights upon the ground of equitable estoppel because of "laches."

Defendant's Alleged "New Defenses" Are Merely Reargu-ments of or Different Examples of Old Defenses.

Although defendant's counsel apparently have now thrown overboard most of the alleged "new defenses" presented to the District Court they have, by that very elimination, only emphasized the fact that the defenses are all old,—are those which were presented to and urged upon the Courts in the Orgill and Clear Vision suits, and by those Courts found to be ineffective, either to anticipate or to negative invention in claims 2, 3, 7 and 8 of the Lunati patent. In opposition to the motion for preliminary injunction defendant relied upon thirty-two patents, a publication (International Library of Technology; Rec. Vol. 3, pp. 2 to 6) and two alleged public uses, one of a hydraulic press (Thomas Bailey Iron Works, Athens, Ga., Lyndon Sketch X, Rec. Vol. 3, p. 309) and one of an example of an ordinary passenger or freight elevator (Otis Elevator Co., Copes Affidavit Exhibit A, Rec. Vol. 3, p. 1).

Of the thirty-two patents presented by the defendant *thirteen* were before the courts in both the Orgill and Clear Vision suits and *three* more were before the court in the Clear Vision suit only. The sixteen additional pat-

ents relied upon by the defendant disclose structures which may be classified as essentially identical in construction, mode of operation and contemplated and possible results with one or more of the sixteen patents which were before the courts in one or both of the prior suits. The publication and the Athens, Ga. and Otis Elevator Co. uses may likewise be classified as relating to structures essentially identical in construction, mode of operation and contemplated and possible results with one or more defenses which were before one or both of the Courts in the prior suits.

The alleged "new defenses" upon which defendant now relies, after discarding the great majority of those presented to the District Court, will be discussed in some detail later. But here it seems fitting to say that all of the defenses may be classified under eight headings. Such a classification will, we believe, be very helpful to Your Honors in accurately gauging the probable pertinence—we say impertinence—of all of these alleged "new defenses." Below all of these defenses are tabulated under the seven appropriate heads and a system of asterisk prefixes is employed so that at a glance it can be told whether any particular defense here asserted was relied upon in both the Orgill and Clear Vision suits or only in the Clear Vision or in neither suit.

Classification of Defenses.

Two asterisks ** —Before Courts in both Orgill and Clear Vision suits.
One asterisk * —Before Court in Clear Vision suit only.
No asterisk —Not before the Court in either Orgill or Clear Vision suits.

Automobile-Underbody Servicing Devices.

** Gearing & McGee— 877,709 (Four fluid actuated posts)
** Zimmerman — 986,888 (Four fluid actuated posts)
** Bauman —1,087,424 (Four screw actuated posts)
Wagner —1,389,403 (Four fluid actuated posts)
Cleveland —1,494,588 (Four fluid actuated posts)
* Hose —1,525,447 (Four fluid actuated posts)

Pit Jacks—Located in Pits for removal of Locomotive and Car Wheels

** Wood — 657,148
** Appleton & McCoy—1,002,797
** Waters —1,571,029 (Reissue 16,989)

Small Portable Jacks.

** Caldwell — 569,574
** Baker — 957,536
Rawlings —1,213,012
** Healy —1,398,132

Lifting Jacks in Transportation.

** Sherrill — 804,060
Turner — 968,501
** Lightner & Holmes—1,398,331

Ordinary Plunger Elevators.

** Milliken — 243,391
Steedman — 932,726
Publication ("International Library of Technology")
Otis Elevator Co. at Whiting-Meade Co.

Barber and Dental Chairs.

Sonnex — 625,425
Holtz — 628,244
Pieper —1,137,080
Koken —1,178,733
Rebmann —1,265,384
* Koenigkramer —1,488,206

Hydraulic Presses.

Thomas Bailey Iron Works (Sketch X)
Baumgarten — 302,880
Cowley — 744,906
Holmes — 753,261
* Gates —1,188,063

Miscellaneous.

Hyde — 216,326 (Four piston dry-dock lift)
Tucker — 390,920 (Hose lifter)
Dutton — 635,848 (Hydraulic Shock Absorber)
** Eide —1,185,640 (Turntable)

Defendant's counsel, perhaps with an appreciation of the applicability of the admonition of Judge Hough in *Ball & Roller Bearing Co.* v. *F. C. Sanford Mfg. Co.*, 297 Fed. 163, threw overboard, as we said before, most of the alleged "new defenses" presented to the District Court and elaborately discussed in the affidavits of defendant's expert Lyndon. In commenting upon the presentation of a multiplicity of references, Judge Hough in that case said:

> "The voluminous record at bar is the best (or worst) example recently presented to us of useless and misleading references to earlier patents and publications. It seems necessary to apply to patent litigation from time to time the maxim that one cannot make omelets of bad eggs—no matter how many are used."

Whatever the reason may have been defendant's brief refers to but **six** of the thirty-five alleged defenses. These selected defenses are:

1. Otis Elevator Co. use—Copes Affidavit, Exhibit A. (Rec. Vol. 3, p. 1.)
2. Publication—International Library of Technology. (Rec. Vol. 3, p. 2.)
3. Thomas Bailey Iron Works hydraulic press, Athens, Ga.—Lyndon Sketch X. (Rec. Vol. 3, p. 309.)
4. Zimmerman patent No. 986,888. (Rec. Vol. 3, p. 233.)
5. Wood patent No. 657,148. (Rec. Vol. 3, p. 201.)
6. Appleton & McCoy patent No. 1,002,797. (Rec. Vol. 3, p. 311.)

Passenger and Freight Elevators Neither Anticipate Nor Negative Invention in Lunati's Automobile Servicing Lift.

The Copes Exhibit A drawing (Otis Elevator Company use) and the International Library of Technology publication show examples of countless varieties of ordinary hydraulic passenger and freight elevators.

Although these particular references were not before the courts in the Orgill and Clear Vision suits the courts in those suits did have presented to them and did consider and very properly find ineffective other examples of hydraulic passenger and freight elevators essentially the same as those illustrated in the Copes affidavit Exhibit A and the International Library of Technology text-book. Ex-

amples of such references which were before the courts in the Orgill and Clear Vision suits are the patent to Milliken (Rec. Vol. 3, p. 57), Jones patent No. 772,361 and the Julien patent No. 946,781. The Jones and Julien patents are not included in the printed record but they were offered in evidence before the District Court as Plaintiffs' Exhibits 34-E and 34-O, respectively.

Of course, such passenger and freight elevators were never intended to afford and cannot afford ready access to the underbody of an automobile standing on the platform thereof. An automobile standing on the platform would be most accessible when the platform is down on the ground,—in that position it would be easier to crawl underneath. Elevation would only serve to make it harder to crawl underneath. The platforms of such elevators cannot rotate. The pistons do not have stops to limit the upward movement thereof. Nor are such elevators provided with parallel vehicle supporting rails between and around which a service station attendant may work while standing up and have ready access to all parts of the automobile within reach.

Hydraulic Presses Neither Anticipate Nor Negative Invention in Lunati's Automobile Servicing Lift.

The Lyndon Sketch X illustrating an hydraulic press used by the Thomas Bailey Iron Works at Athens, Ga., some forty years ago is one example of innumerable varieties of hydraulic presses which have been in common use for many, many years. Needless to say, such devices were neither intended nor adapted to serve nor are they capable of serving as an automobile servicing lift.

This particular press includes a plunger having a solid platform or "pressure head" mounted on its upper end. Four columns, which hold the stationary upper pressure

head, fit grooves in the movable lower pressure head so as to prevent its rotation,—rotation, of course, being undesirable in a press. The device has no rails of any sort, to say nothing of parallel vehicles supporting rails. It has no stop on the plunger to limit upward movement thereof.

Zimmerman Patent Neither Anticipates Nor Negatives Invention in Lunati's Automobile Servicing Lift.

The Zimmerman patent is the only one of the six finally selected defenses which relates to a device adapted for the underbody servicing of automobiles, *i. e.*, Lunati's purpose and the purpose of the defendant's lift. The Zimmerman lift is actuated by four hydraulic plungers, one under each corner—two under each rail near opposite ends. Such a lift would, of course, be incapable of rotation and the four lifting plungers under the four corners would prevent ready accessibility to the raised automobile underbody. The cost of such a device would be many times that of a Lunati lift. Furthermore, because the weight of an automobile never could be equally distributed, it would be impossible effectively to operate all four plungers simultaneously with the result that the lift would tilt and bend or break either the pistons or the rails or both.

Before the District Court defendant's counsel repeatedly asserted that this Zimmerman patent disclosed a two post lift, but eventually he admitted his mistake when he said:

> "There is, however, one thing I do wish to make a correction about: Mr. Hinkle is correct with respect to the Zimmerman patent having two columns at each end." (Rec. Vol. 2, p. 803.)

Wood Patent Neither Anticipates Nor Negatives Invention in Lunati's Automobile Servicing Lift.

This Wood patent, in addition to being one of the principal defenses relied upon in the Orgill and Clear Vision suits, was cited and considered by the Patent Office Examiner during the prosecution of the Lunati application for patent, and the claims in suit were allowed thereover. It constitutes the principal reference relied upon here, just as it did before the District Court. Defendant's expert and counsel devoted more time and space to the exposition of this reference than to any other. Perhaps one explanation for such a prolonged treatment is that, as explained by defendant's counsel, "in the Wood patent **we find great complexity and elaborate combination of features.**" (Defendant's Brief, p. 163.)

The Wood patent relates to what is commonly called a "pit jack,"—a device for facilitating the removal and replacement of wheels of locomotives and railway cars. Its purpose is to support a locomotive or railway car body **at the four corners** and, after the wheels are disconnected therefrom, to lower the wheels and move them from beneath the locomotive or car and finally to raise another set of wheels up into position for attachment to the locomotive or car. Four corner jacks designated in the patent G^1, G^2, G^3 and G^4 support the four corners of the locomotive or car. These four jacks are set at the edge of a large circular hole or "pit" (see particularly Fig. 2) into which the wheels are lowered. Standing on the bottom and in the center of the pit is a jack which comprises a cylinder D′ and a piston D^2. Loosely mounted upon the piston is an outer tubular casing B^1, which casing through ball bearings is slidable up and down over and rotatable about the cylinder. Crossed pairs of railway tracks B^1 and B^2 are

attached to the top of this outer tubular casing B^4 and extend to the edges of the pit to register with other tracks which may come up to the edge of the pit at various angles. Because of the fact that the tubular casing and the crossed tracks carried thereby can be rotated upon the cylinder and piston of the center jack, the crossed tracks can be brought into register with any of the tracks outside of the pit. In order to support and prevent the tilting of the crossed tracks under the weight of the locomotive or car wheels an elaborate and complicated system of bracing B^3 extends from the outer ends of the crossed tracks to the lower end of the casing B^4 and a system of counterweight supporting frames E^1 and E^2 and adjustable counterweights E^3 are suspended below the crossed tracks. Further, to safeguard the crossed tracks against tilting while a locomotive or car is being run upon them a "pivoted brace F'" or, as an alternative, a wedge-shaped "shoe" F^2 is adapted to be adjusted below each outer end thereof at the edge of the pit.

In operation a locomotive or railway car is run over the pit on one of the crossed tracks B^1 or B^2, the braces F' (or alternative shoes F^2) under the ends of the crossed tracks at the edge of the pit taking the weight. The locomotive or car body is then slightly elevated by the four corner jacks G^1, G^2, G^3 and G^4 to take the weight thereof from the wheels. Then the wheels are disconnected from the locomotive or car, the braces F' or shoes F^2 are withdrawn and the center jack is lowered to carry down into the pit the crossed tracks and the wheels resting thereon. A new set of wheels, which may be resting on the other of the crossed tracks, can be brought under the locomotive or car—by turning the crossed tracks upon the central jack—and then pushed up into position by causing the central jack to raise the crossed tracks up to the level of the edge of the pit.

that an automobile is run upon the rails of Wood's pit jack. The automobile would, of course, be driven on to Wood's rails when they are at ground level. All that can be done thereafter is to lower the automobile into the pit. Wood's central jack is not intended or arranged so that it can ever lift anything above ground level. If Wood's pit were five or six feet deep, then the automobile mechanic in attempting to service the underbody of the automobile, would climb down into the pit and worm his way through the trestle work and counterweights in an effort to get at the underbody of the automobile. If Wood's pit were more than five or six feet deep, then the automobile would be lowered into the pit until the rails were five or six feet above the floor of the pit,—and again the automobile mechanic would climb down into the pit and then through the trestle work and counterweights in an attempt to reach the underside of the car.

If, in other words, the Wood device were attempted to be applied to this new use for which it was never designed or intended, it would amount to nothing more than the old automobile servicing pit down into which the automobile mechanic could climb in order to reach the underside of the automobile. Even if the Wood mechanism were reorganized in such a way as to elevate the rails above the ground level rather than to depress them below the ground level, the trestle work and the counterweights would prevent any satisfactory access to the underbody of an automobile supported on these rails.

There is, of course, no doubt that the Wood mechanism could be reorganized, modified, and reconstructed in such a way as to accomplish Lunati's purpose,—but in such case we should no longer have Wood's pit jack, but rather Lunati's automobile lift. The Wood patent does not disclose the combinations of any of the claims in suit of the Lunati patent. The controllingly important consideration is that Wood's pit jack did not suggest Lunati's automobile lift.

The persistence of defendant's counsel in advancing this old threadbare Wood patent as one of the best—indeed the very best defense—that can be offered, is an enlightening admission of weakness.

The Appleton & McCoy Patent Neither Anticipates Nor Negatives Invention in Lunati's Automobile Servicing Lift.

The Appleton & McCoy patent, like the Wood patent, relates to a railway "pit jack." Like the Wood patent, it was one of the references relied upon in the Orgill and Clear Vision suits,—and by the courts found wanting. And again like the Wood patent it was cited by the Patent Office Examiner during the prosecution of the Lunati application, and the claims in suit allowed thereover.

The Appleton & McCoy patent shows a large rectangular excavation or "pit" below and extending at right angles beyond the railway tracks, in which tracks there is a gap the width of the pit. An hydraulic jack is located at the bottom of the pit below the gap in the tracks. A small wheeled truck or dolly carries track sections of a length to bridge the gap in the railway tracks, the wheels of this dolly fitting narrow gauge auxiliary tracks which are at the bottom of the pit and extend along the bottom thereof at right angles to the main tracks. The upper end of the piston of the jack is arranged to push up under the bottom of the dolly so as to raise it from the lower auxiliary tracks until the sections of track carried thereby register with the upper main tracks.

In operation, with the dolly in its upper position, the locomotive or car from which wheels are to be removed is run across the pit until the wheels to be removed are upon the track sections of the dolly. The weight of the locomotive or car, when the wheels are removed, must be borne by some suitable arrangement, such as four corner

jacks as in the Wood patent. Then the wheels are disconnected and lowered into the pit on the little dolly. When the dolly reaches the bottom of the pit its wheels rest upon the auxiliary tracks and the jack plunger becomes disengaged therefrom. Then the dolly may be moved on the lower auxiliary tracks out from beneath the main tracks and the wheels carried thereby "removed from the pit in any suitable well-known manner which may be found most suitable for this purpose" (patent page 3, lines 39-41).

The device was never intended to operate and cannot operate outside of a large excavation or "pit." It was never intended to elevate and cannot elevate an automobile for servicing the underbody or any other useful purpose. It was not intended to and cannot rotate. It has no rails free from extraneous elements and it has no stop for the piston.

Note: Lest, at the hearing, defendant's counsel may assert that some reference other than the six "selected" ones is a best defense we have in an appendix to this brief given a brief analysis of all of the thirty-five references submitted in opposition to plaintiffs' motion for preliminary injunction. This analysis is supplemented by charts which will show at a glance the elements of each claim which are missing from each reference.

Lunati's Invention First Satisfied a Long-Felt Want.

The Lunati lift came into an art which had long sought a simple, effective, reliable and relatively inexpensive device for affording ready access to the underbody of an automobile by a man standing on the floor or ground. It had long been recognized that such accessibility would greatly simplify, improve and cheapen the lubrication, inspection and repair of automobiles.

The difficulties, dangers and general unsatisfactoriness of

pits and racks were well known. And yet up to the time of the advent of the Lunati lift there was no satisfactory substitute for pits and racks.

The record in this case shows that prior to the advent of the Lunati lift at least six inventors had tried unsuccessfully to solve the problem which he finally succeeded in solving. These six earlier unsuccessful efforts are represented by the following patents:

Gearing & McGee—1907—4-plunger hydraulic lift.
Zimmerman—1910—4-plunger hydraulic lift.
Bauman—1913—4-screw-post lift.
Wagner—1920—4-plunger hydraulic lift.
Cleveland—1922—4-plunger hydraulic lift.
Hose—1923—4-plunger hydraulic lift.

Apparently none of these prior lifts ever went into use to an extent sufficient to enable a single instance of use to be found. No use whatever of any of these patented devices has been alleged in this or any of the prior litigations.

The reasons for the failure of these six devices are obvious when they are compared to Lunati's lift. All are more complicated and expensive. All require four posts (fluid operated in all except Bauman and screw operated in Bauman). None but Bauman is rotatable and Bauman requires a complicated, expensive and ineffective turntable to effect rotation. None would afford unobstructed access to the underbody of an automobile because of the multiplicity of posts below the vehicle supporting rails. Simultaneous and equal operation of the four fluid jacks required by five of these devices would be impossible, with the result that the mechanism would bind and break and automobiles lifted thereby would be dangerously tilted. The four screws of Bauman would be almost equally ineffective and certainly too expensive and complicated to compete with single plunger lifts of the Lunati type.

Contrasted to the cumbersome, expensive, ineffective and

practically inoperative and useless devices of these prior inventors who sought to accomplish Lunati's purpose, the Lunati lift is in all respects satisfactory. Its simplicity, reliability, cheapness, flexibility and effectiveness have resulted in its almost universal adoption by the higher class and more progressive service stations, filling stations and garages. The unquestionable merit and utility of automobile servicing lifts of the Lunati type are amply evidenced by the statement of the defendant that high pressure lubricating equipment, which nowadays is found almost universally at filling and service stations and garages, "is practically useless unless the customer buying the same has first purchased an automobile hoist" (Sommer affidavit, Rec. Vol. 1, p. 328).

Of course, hydraulic and pneumatic barber and dental chairs, railway pit jacks (for removing and replacing the wheels of railway cars and locomotives), small portable jacks, passenger and freight elevators and presses, were well known and extensively used for many years before the advent of the automobile.

It is easy now to say that Lunati's conception and combination were obvious, did not involve invention, are nothing but an aggregation, show nothing but mechanical skill and cannot possibly support a patent. In the light of Lunati's accomplishment it is easy to say that the hydraulic barber or dental chair or the ordinary hydraulic passenger or freight elevator or the railway pit jack or the hydraulic press or any of the almost countless varieties of small portable lifting jacks contain all that the Lunati lift contains and anticipate or relegate his contribution to the art to the realm of mere mechanical skill.

But the history of the art of servicing automobiles conclusively shows that, at the time, Lunati's solution of the problem was not obvious, in fact, it never occurred to any one. The problem was by no means a new one when he applied for a patent in 1924; it had been recognized for

about twenty years at least (Gearing & McGee). During the intervening years no less than six inventors sought to solve that problem and all failed to solve it notwithstanding the prevalence of these barber and dental chairs, elevators, presses, pit jacks and the like which are here—just as they were in the Orgill and Clear Vision suits—asserted so emphatically to teach all that Lunati did. But the record of the art—the way strewn with the wrecks of fond hopes—furnishes the correct answer to this contention. Actions speak louder than words. The proof of the pudding is in the eating thereof. No one prior to Lunati discerned and appreciated that the ordinary elevator or the pit jack or the barber chair or the hydraulic press possessed features and operated upon principles which with appropriate modifications and additions might be useful in providing a single plunger rotatable parallel-railed unobstructing lift for affording access to the underbody of motor vehicles. Of course, now that the problem has been solved, now that Lunati's simple but none the less admirable solution is known it may seem quite obvious. Perhaps one may well wonder why it so long escaped the perception of those skilled in the art. But the point is—not why was it not done before—but that it was not done before Lunati did it and in spite of a recognized need and of repeated efforts to do it.

Consolidated Contract Co. v. *Hassam Paving Co.*, 227 Fed. 436, 439 (C. C. A. 9th, 1915, Morrow, C. J.).

"It is contended by the appellants that each of these elements had been employed, prior to the issuance of the patents, in the construction of roads or streets, or in structures. *But this of itself would not negative invention.* It is true the mere bringing together of old elements, which in their new places do no more than their original work, and not co-operate with other elements in doing something new and useful, is not invention; *but if they coact with each other in a new and*

unitary organization, so as to produce a more beneficial result than by their separate operation, it may constitute a patentable combination." (Italics ours.)

If anything more is needed to show that what Lunati did was not so obvious as counsel for defendant now contends, it is supplied by the defendant himself when in his first affidavit he said:

> "I further depose and say that I first began to develop and experiment with the said automobile hoists which I now manufacture and sell, in the year 1924, and such experimental work continued until and during the year 1927."

It is contended that the Lunati lift is a mere aggregation of old elements each performing its old function and accomplishing its old result and nothing more.

The absurdity of this contention is self-evident. No prior device could accomplish the results attainable with the Lunati lift. Parallel rails for supporting a vehicle were old but they were never carried by a single rotatable plunger; they were never free from extraneous elements from their ends to the central support; and consequently underbody accessibility and the capability of unlimited rotation when elevated and depressed were lacking. Lunati, by uniting or combining parallel unobstructed rails and the single rotatable plunger, produced therefor a new combination in which to be sure the rails accomplish the old purpose of supporting a vehicle but also and in addition accomplish wholly new results, viz., unobstructed accessibility to the motor car underbody together with the ability to drive the car thereover from any direction, to rotate the car at will while raised and, when lowered, to drive the car away in any desired direction. Neither parallel rails nor plunger alone would accomplish these desirable results, nor could the prior art combinations of parallel rails supported by a plurality of plungers or posts accomplish these results. But, on the

other hand, Lunati's new combination of parallel rails and single rotatable plunger does accomplish all of the results. Lunati provided, from elements which were separately old, a "new and unitary organization, so as to produce a more beneficial result than by their separate operation" or by any previously known combination of these elements.

Furthermore, Lunati's new combination of single rotatable plunger and parallel supporting vehicle rails not only produced a new structure, but effected new results and a new mode of operation. Never before had parallel vehicle supporting rails been carried and elevated by a single centrally disposed hydraulic plunger to afford access to an automobile underbody. Never before had a single rotatable and vertically movable plunger carried parallel vehicle supporting rails which it could elevate to afford access to the underbody of an automobile.

Lunati's invention fully meets the test set forth by the Supreme Court of the United States in *Loom Co.* v. *Higgins*, 105 U. S. 580, 26 L. Ed. 1177, wherein the Court said:

> "It is further argued, however, that supposing the devices to be sufficiently described, they do not show any invention; and that the combination set forth in the fifth claim is a mere aggregation of old devices, already well known and, therefore, it is not patentable. This argument would be sound if the combination claimed by Webster was an obvious one for attaining the advantages proposed,—one which would occur to any mechanic skilled in the art. But it is plain, from the evidence and from the very fact that it was not sooner adopted and used, that it did not, for years, occur in this light to even the most skillful persons. It may have been under their very eyes, they may almost be said to have stumbled over it; but they certainly failed to see it, to estimate its value, and to bring it into notice. Who *was* the first to see it, to understand its value, to give it shape and form, to bring it into notice and urge its adoption, is a question to which we shall shortly give our attention. At this point we are constrained to say that we cannot yield our assent to

> the argument, that the combination of the different parts or elements for attaining the object in view was so obvious as to merit no title to invention. *Now that it has succeeded, it may seem very plain to anyone that he could have done it as well.* This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new *combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.*" (Italics ours.)

And also that set forth by this Court in *Stebler* v. *Riverside Heights Orange Growers' Ass'n.*, 205 Fed. 735 (C. C. A. 9th Ct. 1913, Dietrich, D. J.):

> "It is not deemed necessary to describe in detail the the Bailey and Hutchins devices. They are not infringed by the plaintiff's claims. True, we may pick out one similarity in one of these devices, and one in another, and still one in another, and, by combining them all, anticipate the inventive idea expressed in the Strain patent, but the combination constituting the invention is not found in any one of them. As we had occasion to say in *Los Alamitas Sugar Co.* v. *Carroll*, 173 Fed. 280, 97 C. C. A. 446:
>
> > " 'It is not sufficient, to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent.' " (P. 738.)

Giving the Terms of the Claims Merely Such Meaning As They Are Given in the Accompanying Specification Claims 2, 3, 7 and 8 Are Clearly Not Met by the Prior Art.

One elementary rule and principle of patent law is that the claims of a patent must be construed in consonance with the accompanying specification. The rule has been expounded and applied by this Court on numerous occa-

sions. We shall limit citation to one case, viz., *Greenawalt* v. *American Smelting & Refining Co.*, 10 Fed. (2d) 98, wherein this Court said:

> "The specifications and the whole language of the patent must be looked into, in determining its claims of invention, and the specifications and claims must be read together. *Mitchell* v. *Tilghman*, 19 Wall. 287, 22 L. Ed. 125; *1900 Washer Co.* v. *Cramer*, 169 F. 629, 95 C. C. A. 157; *Royal Co.* v. *Tweedie* (C. C. A.), 278 F. 351." (P. 100.)

The Lunati patent is entitled "Lifting Device for Motor Vehicles."

The specification explains the purpose of the device as follows (Rec. Vol. 3, p. 43):

> "My invention relates to lifting devices for *motor vehicles*. The principal object of the invention is to provide a device whereby a vehicle may be elevated above the ground *to permit ready access to the mechanism carried by the underbody by a garage mechanic for the purpose of repairing and cleaning the vehicle* and to provide a construction of this kind which is compact and will occupy comparatively small space and may be readily operated *by fluid pressure supplied from a convenient source.*" (Italics ours.)

Thus the word "vehicle" in the claims of the patent means a motor vehicle or automobile. It does not mean the cage or platform of a passenger or freight elevator or the passengers or freight carried thereby. It does not mean the wheels of a locomotive or railway car or the material between the head and abutment of an hydraulic press or the patient or customer sitting in a dental or barber chair.

The specification explains that the "vehicle supporting means mounted on said piston"

> "consists of two channel rails 10. These channel rails are bolted to the attaching member 9. They extend laterally from the hollow piston on opposite sides thereof and are spaced apart a suitable width to receive the wheels of the ordinary *motor vehicle*. *These*

rails are secured only to the head carried by the centrally mounted piston and they extend *freely* from said central support without other means of bracing or supporting means *beneath the same throughout their full extent so as to leave a free, unobstructed space beneath the vehicle supporting rails* whereby ready access is afforded to the vehicle. By this arrangement, the vehicle is adapted to be supported in equipoise by the parts of the supporting members *extending freely from the center, and by means of the central, single piston only.*'' (Italics ours.)

This description makes it perfectly clear that what is meant by ''a vehicle lifting device'' is a device for lifting a motor vehicle (automoble) to afford access—not merely visibility—to the automobile underbody and that the expressions ''vehicle supporting means'' (claim 2) and ''means for supporting a vehicle'' (claim 8) contemplate, and contemplate only, ''means'' which are mounted on the plunger, **''extending freely from the center''** and supported **''by means of the central single piston only.''**

It is furthermore obvious that the expression ''spaced parallel rails secured to said support'' (claim 7) contemplates rails supported ''by means of the central single piston only.''

When so properly construed in consonance with the patent specification claims 2, 7 and 8 are not anticipated by and do not describe any structure in the prior art. It is quite obvious that they should not be construed and cannot properly be construed as descriptive of passenger and freight elevators or pit jacks or hydraulic presses or barber or dental chairs. It is equally obvious that they do not describe 4-plunger lifts such as the Zimmerman patent or 4-screw operated lifts such as the Bauman patent.

Claim 3 is so obviously not descriptive of any prior art device that it needs little, if any, discussion. No prior art device includes ''a pair of spaced parallel rails arranged on opposite sides of a supporting member'' which member

is carried by the upper end of the piston and is "provided with outwardly diverging portions secured at their ends to said rails near the centers thereof, said rails being relatively long and free from extraneous elements from their ends to the diverging portions of said supporting member."

Lunati's Invention is Not a "Double Use" of Any Prior Art Device.

Defendant's counsel repeatedly asserts that the Lunati patent is invalid because it is "at best for an unpatentable double use." This contention is entirely wrong and completely disregards the true meaning of double use.

The case of *Miller* v. *Eagle Mfg. Co.,* 151 U. S. 186; 38 L. Ed. 121, cited in defendant's brief (p. 4) in support of the argument that the Lunati patent is invalid because it is for a mere "double use" of an ordinary passenger or freight elevator is not in point at all. What that case decided was that two patents could not be valid for the same invention.

Possibly the most exact and best expressed exposition of the doctrine of "double use" is that found in Robinson on Patents, Vol. 1, Sec. IV, page 354. Beginning at page 361 Robinson says:

> "It will assist us in our own investigation of this doctrine [double use] to remember: (1) That in all cases turning on diversity of use it is assumed that the *identity of the invention used remains entirely undisturbed;* and (2) That the real question is, whether the changed employment of the *unchanged* invention involves an exercise of the creative powers, and introduces a new idea of means, not into the art or instrument itself, but *into the manner of its use,* and so makes the new mode of its employment a new and separate invention." (Italics ours.)

Thus a "double use" can only involve the application of the **identical thing**—the same combination—to a different

use; it does not involve a different use of a **different thing —a different combination.**

Numerous decisions might be cited in support of this—the true—definition of "double use." But we need refer to no other than the case referred to by defendant's counsel, viz., *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U. S. 485, 44 L. Ed. 856, wherein the Supreme Court said:

> "Having all these various devices before him, and, whatever the facts may have been, he is chargeable with a knowledge of all pre-existing devices, did it involve an exercise of the inventive faculty to employ *this same combination* in a windmill for the purpose of converting a rotary into a reciprocating motion? We are of the opinion that it did not.
>
> ". . . He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply *it* to a new purpose in a machine where *it* had not before been used for that purpose. . . . In our opinion this *transfer* does not rise to the dignity of invention." (Italics ours.)

Ordinarily a mere different use of the same thing is unpatentable, although as stated by Walker on Patents, there is an exception to this general rule, viz., when the new use is *non-analogous* to the old use. Thus Walker on Patents (Sixth Edition), Vol. 1, p. 96, says:

> "It is not invention to use an old process, machine, manufacture, composition of matter, or design for a new and *analogous* purpose."

And at page 98:

> "It may be invention, to use an old process, machine, manufacture, composition of matter, or design, for a new and *non-analogous* purpose."

We do not think that even defendant's counsel would dispute the statement that, **without some change,** none of the prior art devices is the Lunati lift. Only a glance at the prior art suffices to show that none is the counterpart or the equivalent of the Lunati lift. Consequently the Lunati

lift is not a double use of any of the devices of the prior art.

Of course, one of the functions of the Lunati lift is to elevate an automobile; another is to permit the automobile to be turned, either when the lift is up or down. But the mere elevating and lowering and turning of an automobile are not the purposes for which the Lunati lift was invented or for which it is used. Lifting, lowering and turning are but incidents—necessary incidents, of course—to the ultimate purpose. They are the means to an end. The real purpose or end is to render the underbody of an automobile readily accessible—not as defendant's counsel so frequently asserts merely visible to permit a workman to **see** the underbody—but for the purpose of enabling the workman to **reach** as well as to see all parts of the underbody from a standing position on the ground or floor.

The only reference here relied upon by the defendant which shows anything even remotely intended to accomplish or capable of accomplishing Lunati's purpose is the Zimmerman patent and, as we have already shown, Zimmerman was but one of a number of inventors who, for almost twenty years before the advent of the Lunati lift, sought unsuccessfully to solve the problem and accomplish the purpose Lunati's lift solved and serves so well. **The reasons for the failure of the Zimmerman device are inherent in the differences between it and the Lunati lift.**

The hydraulic cylinder and plunger in and of themselves were, of course, old and well known. But even in so far as these elements alone are concerned, the use of a single hydraulic cylinder and plunger for bodily lifting an automobile was an entirely new use of these elements and this new use was made feasible and possible by a combination of the old cylinder and plunger with other elements, with which such a cylinder and plunger had never before been combined. It was the new combination, and the new com-

bination only, which enabled Lunati to accomplish a new and better result than had ever been accomplished before, and as a result of which his combination has almost completely displaced the use and sale of every other device which has ever been proposed for the underbody servicing of automobiles.

Just such a situation as is presented by the Lunati patent has never been more pithily summarized than by his Honor Judge Learned Hand, who, speaking for the Second Circuit Court of Appeals in *Traitel Marble Co.* v. *U. T. Hungerford,* 18 Fed. (2d) 66, said (p. 68):

> "Assuming, for argument, that the law is absolute that there can be no patent for the new use of an old thing, that is because the statute allows no monopolies merely for ideas or discoveries. If the thing itself be new, very slight structural changes may be enough to support a patent, when they presuppose a use not discoverable without inventive imagination. We are to judge such devices, not by the mere innovation in their form or material, but by the purpose which dictated them and discovered their function. Certainly the art would have waited indefinitely, in the light of all that McKnight disclosed for Calkins's contribution to its advance. It will not serve now to observe how easy it was, given the suggestion, to change his invention into that of the patent in suit."

The defendant is perfectly free to use the Otis or any other passenger or freight elevator, or any hydraulic press, or the Wood or Appleton & McCoy "pit jacks" or the Zimmerman 4-post lift if he desires so to do. Had he adopted any of these devices he never would have become involved in this litigation.

But did the defendant choose to adopt any of these prior devices? No. With the whole art before him he admittedly experimented for a number of years, and only attained success after he had adopted the Lunati invention in substance and in spirit.

Lunati Claims 2, 3, 7 and 8 Clearly and Accurately Describe Defendant's Lift.

Defendant's counsel apparently wishes to convey the impression that, before the District Court, the claims were never applied to the defendant's lift.

The fact is that in the course of the argument before the District Court on November 30th plaintiffs' counsel did apply each of claims 2, 3, 7 and 8 element by element to the defendant's lift (Rec. Vol. 2, pp. 783-789).

Defendant's counsel erroneously asserts that the lift held to infringe in the Orgill suit was radically different from the defendant's lift.

In order briefly and yet fully to demonstrate the complete and accurate applicability of each and every element of each and every one of the claims in suit we have reproduced on the opposite folded page the drawings of the Lunati patent and drawings of the defendant's "Comwel Hoist," of the Curtis lift held to infringe in the Orgill suit and of the "Clear Vision Hoist" preliminarily enjoined in the Clear Vision suit.

In the following four pages of charts each claim is separated into its various elements and, by like reference characters, the corresponding part of each of these four lifts is properly designated.

LUNATI NO. 1,552,236 CLAIM 2	Corresponding Elements			
	Lunati Patent	Defendant's "Comwel Hoist"	Curtis Lift Orgill Suit	"Clear Vision Hoist"
A vehicle lifting device comprising				
a hollow casing,	1	1	1	1
means for admitting fluid pressure thereto,	14	14	14	14
a single vertically movable and rotatable piston mounted in said casing,	5	5	5	5
vehicle supporting means mounted on said piston, and	9, 9a & 10	9, 9a & 10	9, 9a & 10	9, 9a & 10
a stop on said piston for limiting the upward movement thereof.	21	21	21	21

LUNATI NO. 1,552,236 CLAIM 3	Corresponding Elements			
	Lunati Patent	Defendant's "Comwel Hoist"	Curtis Lift Orgill Suit	"Clear Vision Hoist"
A vehicle lifting device comprising				
a vertical cylinder,	1	1	1	1
a piston mounted to reciprocate therein,	5	5	5	5
means for supplying fluid pressure to said cylinder to lift said piston,	14	14	14	14
a supporting member carried by the upper end of said piston,	9 & 9a	9 & 9a	9 & 9a	9 & 9a
a pair of spaced parallel rails arranged on opposite sides of said supporting member, said member being provided with outwardly diverging portions secured at their ends to sale rails near the centers thereof, said rails being relatively long and free from extraneous elements from their ends to the diverging portions of said supporting member.	10	10	10	10

LUNATI NO. 1,552,236 CLAIM 7	Corresponding Elements			
	Lunati Patent	Defendant's "Comwel Hoist"	Curtis Lift Orgill Suit	"Clear Vision Hoist"
. vehicle lifting device comprising				
ı vertical cylinder adapted to be embedded in the earth and provided with an open upper end,	1	1	1	1
ə piston mounted to reciprocate in said cylinder and projecting from the upper end thereof,	5	5	5	5
a gland secured to the upper end of said cylinder and surrounding said piston, the surface of the earth in which said cylinder is embedded being provided with a relatively small shallow depression in which said gland is arranged,	7	7	7	7
means for supplying fluid pressure to said cylinder to lift said piston,	14	14	14	14
a support carried by the upper end of said piston, and	9 & 9a	9 & 9a	9 & 9a	9 & 9a
spaced parallel rails secured to said support, said rails projecting a substantial distance beyond said depression and being supported on the surface of the earth when said piston is in lowered position.	10	10	10	10

LUNATI NO. 1,552,236 CLAIM 8	Corresponding Elements			
	Lunati Patent	"Defendant's "Comwel Hoist"	Curtis Lift Orgill Suit	"Clear Vision Hoist"
vehicle lifting device comprising				
vertical cylinder,	1	1	1	1
piston mounted to reciprocate in aid cylinder, the lower end of said ylinder being slightly greater in iameter than said piston, the upper nd of said cylinder being of the ame diameter as and adapted to snug-y receive said piston,	5 & 22	5 & 22	5 & 22	5 & 22
projection carried by the lower nd of said piston and extending out-ardly therefrom,	21	21	21	21
eans for supporting a vehicle on he upper end of said piston, and	9, 9a & 10	9, 9a & 10	9, 9a & 10	9, 9a & 10
eans for supplying fluid pressure o said cylinder to lift said piston.	14	14	14	14

Defendant's Lift Is the Counterpart of the Lunati Lift Having the Same Elements, the Same Organization, the Same Mode of Operation and Producing the Same Results.

The Lunati lift and the defendant's lift are intended for the accomplishment of and do accomplish the same purpose, viz., the elevation of an automobile to render the underbody readily accessible for lubrication, repair and inspection by a man standing on the ground. There can be no dispute about this point.

The lift disclosed in the Lunati patent and covered by claims 2, 3, 7 and 8 and the defendant's lift are practically identical—certainly equivalents—in every essential respect and element.

Both are operated by fluid pressure.

Both have a single stationary vertical cylinder adapted to be embedded in the earth and one vertically movable and rotatable hollow piston mounted in the cylinder.

Both depend upon fluid pressure exerted between the stationary cylinder and the movable plunger to raise the plunger.

Both use a liquid (oil) which fills the space between the cylinder and plunger when the lift is up and which must be permitted to escape or be "emitted" (as defendant's counsel expresses it) from this space (*i. e.*, from the cylinder) to enable the plunger to come down. This use of oil in the cylinder of the defendant's lift and the emission of that oil from the cylinder when the plunger descends were admitted by defendant's counsel when, in describing the defendant's lift he said:

> "Oil is used in the cylinder, of course, to raise the plunger and it is taken out and **emitted** to allow the plunger to descend" (defendant's brief, p. 189).

In both lifts this oil is stored in a chamber or tank from which it is forced by fluid pressure (compressed air) into this space (*i. e.,* into the cylinder) when the plunger is to be elevated. In the Lunati patent this chamber or tank is outside of the plunger cylinder combination, while in the commercial lifts of both the plaintiffs and the defendant it is inside of the plunger cylinder combination (*i. e.,* the hollow plunger itself). However, none of the claims in suit specifies the location or the presence of a fluid tank, either inside or outside of the cylinder.

Both have parallel vehicle supporting rails carried by the single plunger.

In their commercial devices the plaintiffs provide these rails in two forms, one wherein the rails engage the tires of the wheels, and the other wherein the rails engage the axles on which the wheels are mounted. (For reference Rec. Vol. 1, p. 12.) The defendant has copied the plaintiffs' form wherein the rails engage the axles.

It is argued that the defendant's lift does not have "traction" rails upon which the wheels of an automobile may be driven. But no claim of the Lunati patent specifies "traction" rails; the most limited description in any claim is merely "spaced parallel rails." The purpose of the rails of the defendant's lift, as is the purpose of the rails in the Lunati lift, is to enable the centrally disposed rotatable plunger to raise the automobile and in elevated position to afford ready access to the underbody.

In spite of fine-spun arguments that the Lunati patent claims are limited to "traction" rails—which is not true—and that the so-called "beams" of the defendant's lift are not "rails," defendant's counsel and expert both admitted the absurdity of this contention. Thus in attempting to describe the old and well-known hydraulic elevator disclosed in the defense publication (Rec. Vol. 3, p. 2), and particu-

larly referring to two I-beams below the elevator platform, defendant's counsel says:

> "Note how the load is supported on rails B" (Defendant's Brief, p. 85).

And defendant's expert, in referring to the Healy patent No. 1,398,132 (Rec. Vol. 3, p. 195), which shows a frame for engaging an automobile chassis, said:

> "This frame comprises two rails made of structural steel channels." (Rec. Vol. 1, p. 392.)

In short, defendant's counsel and expert assume the peculiar and wholly inconsistent position that parallel beams to support anything may be "rails" if shown in the prior art but parallel beams as used in defendant's lift to support an automobile for underbody servicing cannot be "rails."

Defendant's Fine-Spun Arguments for Non-Infringement Are Untenable.

Defendant's arguments that claims 2, 3, 7 and 8 of the Lunati patent do not describe and are not infringed by the defendant's lift, are based upon five erroneous premises; which may be briefly stated and answered as follows:

1. That defendant's lift utilizes a different mode of operation from that of the Lunati lift; **whereas it actually operates upon essentially the same mode.**

2. That the defendant's lift is totally different in construction and constitutes a total reorganization of structure and mode of operation of the Lunati lift; **whereas it is essentially the same as the Lunati lift in construction, organization, mode of operation and results.**

3. That in the defendant's lift the liquid is "never emitted from the cylinder" as it is in the Lunati lift;

whereas in both lifts the liquid is forced into the stationary cylinder between the walls thereof and the plunger to elevate the plunger and leaves or is "emitted" from the cylinder to permit the plunger to sink.

4. That the rails of the defendant's lift are not "traction" rails; whereas the claims do not specify "traction" rails but merely "rails" or "parallel vehicle supporting rails" and in so far as elevating an automobile for underbody servicing is concerned, the rails of defendant's lift are the equivalent of those illustrated in the Lunati patent.

5. That the file-wrapper of the Lunati patent—by showing limitations imposed upon the claims before allowance—prevents the claims from being construed to cover the defendant's lift; whereas there is absolutely nothing in the file-wrapper to create such an estoppel.

The defendant's expert Lyndon, just as did the defendants in the Orgill and Clear Vision suits, tries to show noninfringement by pointing out immaterial differences between the defendant's lift and the lift shown in the drawings of the Lunati patent,—differences in details which have no significance whatever in connection with any claim in suit. In this comparison defendant's highly technical expert adopts just the reverse of the attitude he assumes when considering differences between the Lunati lift and the structures of the prior art. Thus when considering the relation between the Lunati lift and the prior art defendant's expert sweeps aside all differences in structure, mode of operation and contemplated or possible results as of no importance whatever while, on the other hand, even the slightest structural differences in details—details to which the claims in suit are not in any sense limited—between the lift shown in the drawings of the Lunati patent and the defendant's lift assume mountainous proportions.

It is true that some of these details might be of some consequence were claims other than 2, 3, 7 and 8 in suit because some of such limitations are included in claims not in suit.

Thus, beginning at page 429 of volume 1 of the Record eleven such immaterial differences between the defendant's lift and the lift shown in the drawings of the Lunati patent are discussed in some detail by the defendant's expert. Very briefly these immaterial differences emphasized by the defendant's expert may be disposed of as follows:

(1) It is pointed out that the head or rail supporting member of the defendant's lift is a "solid disk" and "a rectangular plate of rolled steel" secured together horizontally by bolts, whereas the Lunati patent shows a head member divided into two parts vertically—instead of horizontally—bolted together to clamp the upper end of the plunger.

This slight difference in the details of the construction of the rail attaching head would have some significance if claim 4 of the Lunati patent was in suit but the two-part head construction and the clamping of the head to the top of the plunger are limitations not present in any of claims 2, 3, 7 and 8.

In the Orgill and Clear Vision suits this "difference" was held to be of no consequence because, in both instances, the heads of the lifts found to infringe were constructed of flat rolled steel members bolted in a horizontal position upon the top of the plunger.

(2) It is pointed out that the vehicle supporting members of the lift shown in the Lunati patent are channels spaced far enough apart to receive the wheels of an automobile driven over the lift, whereas in the defendant's lift the vehicle supporting members are I-beams spaced a less distance apart so as to lie within rather than in the line of the wheels of an automobile driven over the lift.

This difference in the automobile supporting rail details has, as we have already pointed out, no significance whatever as to the claims in suit because none of these claims is limited to a structure wherein the rails engage the automobile wheels as distinguished from the automobile axles.

In the Clear Vision suit the Court held this difference in rail spacing to be of no consequence because that company's "free wheel" lift (where the rails are separated less than wheel tread) and its "drive-on" or "run-on" lift (where the rails are separated the width of wheel tread) were both enjoined.

(3) It is pointed out that the lift shown in the Lunati patent has a top casting or member (ring 8) *on* the cylinder to which the packing gland (7) is attached by screws, whereas in the defendant's lift the gland is attached by screws to nuts or lugs welded on the cylinder.

Claim 7 is the only claim which mentions the gland and that claim merely specifies that the gland is "secured to the upper end of said cylinder" which obviously is true of the defendant's lift.

(4) It is pointed out that the defendant's lift has no "excavation or hole in the ground to receive a casting or the top portion of the cylinder or any gland holding member." While all this may be true, it has nothing whatever to do with claim 7 which specifies that there is a "relatively small shallow depression in which the gland is arranged" and the gland of the defendant's lift does lie in a small shallow depression in the ground or floor at the upper end of the cylinder so that the rails may be lowered to rest upon the ground or floor.

In this respect the defendant's lift is like the Curtis Company lift, which, in the Orgill suit, was held to infringe.

(5 and 6) It is pointed out that the plunger of the defendant's lift engages two spaced bearing or guide rings located within and carried by the cylinder, whereas the

Lunati patent shows a single long bearing for the plunger. But such details are of no significance whatever in connection with claims 2, 3 and 7; and as to claim 8, the defendant's guide or bearing rings are as much a part of the cylinder as is the single guide or bearing member of the lift shown in the Lunati patent. At most it can merely be said that the defendant has made in two parts an element which the patent shows in one piece and that does not avoid infringement.

The lifts which were held to infringe in the Orgill and Clear Vision suits were, in this respect, like that of the defendant.

(7) It is erroneously pointed out that the plunger of the defendant's lift is closed at both ends, whereas the patent shows a plunger closed at the top but open at the bottom. As a matter of fact the defendant's plunger is **open at the bottom** although not completely so. None of the claims in suit particularize as to which end of the plunger is closed.

The Curtis Company lift involved in the Orgill suit had a plunger completely closed at both ends; while the plunger of the Clear Vision lift was partly open at the lower end just as is the plunger of the defendant's lift.

(8) It is pointed out that the pressure fluid in the defendant's lift is supplied to the inside of the plunger, whereas the Lunati patent shows the pressure supplied outside of the plunger. But in both lifts pressure must be built up between the stationary cylinder and the movable plunger so that in both cases fluid pressure must be and is applied to the cylinder or the lifts would not work.

In one form of lift made by the Clear Vision Pump Company the pressure-fluid pipe entered at the bottom of the cylinder, projected upwardly through a hole in the lower plunger-head and opened within the plunger above the highest level to which the oil can rise therein, in pre-

cisely the same way as does the pressure fluid pipe of the defendant's lift. This Clear Vision lift was enjoined.

(9) It is pointed out that the defendant's lift has no hinged approaches at the ends of the rails, whereas the patent shows such members. The hinged approaches are not included in any of claims 2, 3, 7 and 8.

(10) It is pointed out that the defendant's lift has no means for "chocking" the wheels of the automobile being lifted, whereas the Lunati patent shows such means. None of the claims in suit include the wheel chocks.

(11) It is pointed out that the immediate lifting agent of the defendant's lift is air, whereas in the lift of the Lunati patent the immediate lifting agent is a liquid (oil). The claims in suit specify a "fluid" as the lifting agent, which term includes both a liquid (oil) and a gas (air).

In this respect one of the Clear Vision lifts which was enjoined was, in structure and method of operation, substantially identical to the defendant's lift.

The Lunati File-Wrapper Creates No Estoppel Against the Application of Claims 2, 3, 7 and 8 to Defendant's Lift.

Defendant's counsel asserts that "claim after claim, having the scope which appellees now urge for their patent, were rejected and cancelled" (Defendant's Brief, p. 24) and that the "continued cancellation and amendment of claims . . . resulted in a surrender of scope" precluding the claims in suit from being construed to describe the defendant's lift (Defendant's Brief, p. 76).

The Lunati file-wrapper does not support but absolutely refutes this contention.

The doctrine of file-wrapper estoppel, as applied by this and every other Court of the United States, may be briefly stated as follows: The claim of an issued patent cannot be construed in such a way as to make it identical with a claim

which has been abandoned, either by cancellation or amendment, during the prosecution of the application.

This doctrine was concisely expressed by this Court in *Angelus Sanitary Can Mach. Co.* v. *Wilson,* 7 Fed. (2d) 314, as follows:

> "Conceding the principle that by amending Wilson is limited to the form and language of the claims as allowed, nevertheless he is not limited to any detailed specific construction to avoid any reference cited against it, nor is he estopped from claiming by the amended claim every improvement and combination which he has invented and which was not disclosed by those references."

No claim which was cancelled from the Lunati application was identical with or the equivalent of any claim in suit. No claim in suit was amended after it was added to the application.

Claim 2 of the issued patent was inserted as claim 9 (subsequently renumbered) by the first amendment filed on March 25, 1925 (Rec. Vol. 3, p. 23). It was never subsequently altered in any way and consequently nothing which transpired subsequent to the filing of this claim can have any effect whatever as an estoppel.

Claim 3 in suit was added to the Lunati application by an amendment dated June 26, 1925 (Rec. Vol. 3, p. 27). It was allowed without any change whatever.

This claim was a new and fresh statement of the essence of the Lunati invention. It cannot be traced back to earlier claims which were either rejected, amended or cancelled. This claim 3 for the first time included a description of the vehicle supporting means in the form of two separate and distinct elements comprising

> (1) A supporting member carried by the upper end of the piston . . . said member being provided with outwardly diverging portions secured at their ends to the rails near the centers thereof; and
>
> (2) A pair of spaced parallel rails arranged on op-

posite sides of the supporting member . . . said rails being relatively long and free from extraneous elements from their ends to the diverging portions of the supporting member.

Claim 7, like claim 3, was added to the application by the amendment of June 26, 1925 (Rec. Vol. 3, p. 28), was allowed without any change whatever, and has no counterpart in any prior claim. This claim includes three additional features not found in any other claims either as previously filed, amended or allowed, viz.:

(1) The mounting of the cylinder in a vertical position embedded in the earth,

(2) The location of a packing gland in a small shallow depression in the surface of the earth around the upper end of the cylinder, and

(3) The extension of the vehicle supporting rails a substantial distance beyond the depression so that they are supported on the ground (or floor) when the plunger is in lowered position.

Each of these three features is present in the defendant's lift. No interpretation of the claim making it the same, or the equivalent of, any claim which was rejected or cancelled or amended is necessary to render it a complete and accurate description of the defendant's lift.

Claim 8, like claims 3 and 7, was added to the application by the amendment of June 26, 1925, and was never altered in any way (Rec. Vol. 3, p. 29). It contains three "limitations" not found in any prior claim, but these limitations do not need to be disregarded or modified in any way in order to render the claim completely and accurately descriptive of the defendant's lift. These three limitations are:

(1) That the lower end of the cylinder is of slightly greater diameter than the piston,

(2) That the upper end of the cylinder is the same diameter as and adapted snugly to receive the piston,

(3) That the piston has a projection carried by its lower end and extending outwardly therefrom.

Here, again, each of these "limitations" is present in the defendant's lift and consequently it is unnecessary to ignore or modify them to find infringement.

Defendant's brief refers to but one cancelled claim in support of the contention that the claims in suit must be construed to be identical with or the equivalent of a cancelled claim in order that they may describe the defendant's lift. This was a claim 6 inserted by the amendment of March 25, 1925, and subsequently cancelled (Rec. Vol. 3, p. 23). This claim read as follows:

> "6. A vehicle lifting device having a fixed cylinder, a source of fluid pressure communicating therewith, a piston mounted in said cylinder for vertical and rotatable movement therein and having means to receive pressure adapted to force the piston upward, a stuffing box for said piston, and vehicle supporting means mounted on the upper end of said piston."

It requires but a glance at this claim to discover the absence of a stop for limiting the upward movement of the plunger (claim 2); of the supporting member carried by the upper end of the piston and having outwardly extending or diverging arms and a pair of spaced parallel rails (claim 3); of the cylinder embedded in the earth, the packing gland located in a depression of the earth around the upper end of the cylinder and the vehicle supporting rails extending beyond the depression so as to be supported on the ground or floor when the piston is lowered (claim 7); and of a cylinder having its lower end of slightly greater diameter than the piston, and its upper end of the same diameter and adapted to snugly receive the piston, and a projection carried by the lower end of the piston and extending outwardly therefrom (claim 8).

Plaintiffs are asking neither for the elimination of nor for any warped or unusual construction of any of these "limitations." All they seek is an interpretation consonant with the drawings and description of the Lunati

patent. When so construed claims 2, 3, 7 and 8 find no duplicate or equivalent among the rejected and cancelled or amended claims. And yet they accurately and fully describe the defendant's lift.

Thus on the authority of the very case cited by defendant's counsel in support of his assertion of file-wrapper estoppel (viz., Your Honor's decision in *W. F. Schultheiss Co.* v. *Phillips,* 264 Fed. 971), the Lunati patent should only be "limited to the precise form and language of the *claims* allowed." When so "limited"—and plaintiffs are not asking that they be not so limited—infringement thereof by defendant's lift is clear.

Defendant's Expert Affidavit Largely Composed of Incompetent and Improper Opinions on Validity and Infringement of Lunati Patent.

Defendant's counsel, both here and before the District Court, criticise plaintiffs' showing in support of the motion for preliminary injunction because no "expert" affidavit was filed on its behalf. The contention is made that a plaintiff on a motion for a preliminary injunction *must* rely upon an expert affidavit. In support of this ridiculous contention defendant's counsel cites *Walker on Patents* which, as a matter of fact, does not say or even intimate that expert testimony *must* be presented. What Walker on Patents does say is:

> "Proof of infringement cannot be made by affidavits *which merely state that conclusion of fact.* The complainant must prove the specific character of the defendant's doings. Upon that evidence the Court will examine and decide the question of infringement in the light of *whatever* expert testimony the case may contain." (Italics ours.) (*Walker on Patents,* Sixth Edition, Vol. 1, p. 796.)

The much criticized affidavit of Mr. O'Brien, which was

neither intended nor purports to be an "expert" affidavit, strictly conforms to the requirement specified by Walker; it merely identifies and describes the defendant's lift, its structural features and operation and results. It establishes "the specific character of the defendant's doings" but makes no attempt to prove infringement by stating "that conclusion of fact." On the other hand, the defendant's "expert" affidavit of Mr. Lyndon fairly reeks with expressions such as "Lunati invented nothing," his patent is "without invention or validity" and "defendant's structure could not infringe it."

In thus expressing opinions upon and attempting to decide the very matters which are the exclusive prerogative and duty of the Court, we submit that the Lyndon affidavit is, very largely, not only incompetent but grossly improper.

The mechanism disclosed and covered by the Lunati patent and the device made by the defendant are exceedingly simple and operate in accordance with principles which are readily understood by anyone. In fact, it is this very simplicity which is largely responsible for their great utility and popularity.

But, in spite of the insistence of defendant's counsel that the Lunati lift is altogether too simple to be patented,—so simple that any ordinary mechanic skilled in the art could have produced it—still, in order to enlighten the Court on this exceedingly simple device defendant submitted an affidavit of an expert who required over four pages of the record to recite his educational, experimental and institutional qualifications along mechanical and electrical lines. A Fellow of the American Institute of Electrical Engineers (a selected group of 760 of a total membership of 13,000), a member of the American Society of Civil Engineers (a selected group of 115 individuals in a total membership of about 25,000 and a Fellow of the Royal Society (of Arts) London. Imagine testing the capabilities

of "the ordinary mechanic skilled in the art" against such a highly trained mind as that of the defendant's expert.

We do not care to dwell longer upon this matter, but believe that it is not amiss to quote from some decisions dealing with the necessity for (in a simple case) and the permissible field of expert testimony.

Hardinge Conical Mill Co. v. *Abbe Engineering Co., et al.*, 195 Fed. 936, 940, Second C. C. A., 1913, Opinion by LaCombe:

> "Its [the defendant's] contention here is that the patent is a puzzling one difficult to comprehend, and that an expert should have been called to show just what is the structure, mode of action, and result of the patented apparatus and also of defendant's; that in no other way could it be made to appear that there is such identity of structure and function as would sustain a finding of infringement.
>
> "We do not agree with defendant's counsel. We find nothing difficult, intricate, or puzzling about the specifications, the drawings, or the single claim, on which complainant relies. Possibly an expert, if allowed to talk long enough, might have made them seem puzzling by the use of a multitude of words, and the reading into the description of propositions suggested by anything in the specifications. Just what the structure is, how it works, and what results from its operation, is set forth in plain language in the patent; there is nothing improbable in the results which the inventor asserts, an assertion to which the Patent Office gave credit." (Page 939.)
>
> . . . . . .
>
> "Complainant is to be commended for not overloading such a simple case with expert testimony." (Pages 939, 940.)

Safety Car Heating & Lighting Co. v. *Gould Coupler Co.*, 239 Fed. 861, 865, Second C. C. A., 1917, Opinion by Hough, C. J.:

> "The record herein largely consists of the opinions of expert witnesses as to the meaning of words and phrases needing no definitions; such testimony (if it can be given that name) is a volunteering of duties

laid by law on jury or court, and should not be suffered. Opinion evidence, on the very point submitted for decision, is always incompetent." (Page 865.)

Kohn v. *Eimer, et al.,* 265 Fed. 900, 903, Second C. C. A., 1920, Opinion by Learned Hand, C. J.:

> "At the outset the appellant challenges our right to examine the prior art patents at all, because the appellee called no expert at the trial to explain them. *Waterman* v. *Shipman,* 55 Fed. 982, 987, 5 C. C. A. 371. We have not the slightest wish to minimize the vital importance of expert testimony in patent suits, or to suggest that we are not absolutely dependent upon it within its proper scope, but that scope is often altogether misapprehended, as the appellant has misapprehended it here. Specifications are written to those skilled in the art, among whom judges are not. It therefore becomes necessary, when the terminology of the art is not comprehensible to a lay person, that so much of it as is used in the specifications should be translated into colloquial language; in short, that the judge should understand what the specifications say. *This is the only permissible use of expert testimony which we recognize. When the judge has understood the specifications, he cannot avoid the responsibility of deciding himself all questions of infringement and anticipation, and the testimony of experts upon these issues is inevitably a burdensome impertinence."* (Italics ours.)

The District Court Properly Sustained Plaintiffs' Objections to Defendant's "First Supplemental Interrogatories."

(This is not a Matter over which this Court can have jurisdiction upon this 30 day appeal.)

Defendant's counsel stresses the sustaining of plaintiffs' objections to defendant's ninety-eight "First Supplemental Interrogatories" as a factor showing "bias and prejudice and unfairness" on the part of the District Court.

As we will now show, the District Court was absolutely

right in sustaining plaintiffs' objections to these highly improper interrogatories.

They were not presented until after the beginning of the hearing on the preliminary injunction motion.

They related to no alleged defense presented to the District Court in opposition to the motion for preliminary injunction, and consequently had nothing whatever to do with the proceeding here on appeal.

They related to no defense properly raised by the defendant's answer or any amendment thereto.

These ninety-eight "First Supplemental Interrogatories" refer to an alleged use of a lift by one John Cochin at San Francisco, California, which defendant's counsel asserts is "a complete anticipation . . . to the Lunati patent" (Defendant's Brief, p. 7).

Such a defense was neither presented to the District Court in opposition to plaintiffs' motion for preliminary injunction nor was it set up in the answer or any amendment thereto.

The District Court sustained plaintiffs' objections,—and properly did so because:

1. They related to no issue raised by the pleadings.

The statutes provide that such defenses shall be set up in the answer. (U. S. Code, Title 35, Sec. 69; Revised Statutes, Sec. 4920):

> "In an action for infringement the defendant may plead the general issue, and, having given notice in writing to the plaintiff or his attorney thirty days before, may prove on trial any one or more of the following special matters:
>
> . . . . . .
>
> "Fourth: That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,
>
> "Fifth. That it had been in public use or on sale in this country for more than two years before his application for patent, . . .

"And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state . . . the names and residences of the persons alleged to have invented or to have had the prior knowledge of the thing patented, and where and by whom it had been used; . . . And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect." (Italics ours.)

2. They related to no facts or documents "material to the support or defense of the cause" as provided by Equity Rule 58.

3. They did not seek ultimate facts but merely matters of evidence.

4. They merely sought to learn what plaintiffs possibly might or might not have been told about alleged evidence conjectured or suspected by defendant or his counsel to exist pertaining to an instance of alleged prior use.

5. They sought to learn from plaintiffs the names of witnesses suspected or presumed by the defendant or his counsel to have some knowledge of the alleged use.

6. They amounted to nothing but a curious excursion or fishing expedition to learn whether or not plaintiffs possessed or knew of any evidence which might possibly establish or tend to establish an alleged use or assist the defendant in discovering and collecting evidence relative thereto.

7. They amounted to cross-examination on purely evidentiary matters pertaining to an alleged ultimate fact of which plaintiffs in answer to previous interrogatories had expressly denied any evidentiary knowledge whatsoever.

8. They called for hearsay evidence.

After a long argument on the propriety or impropriety of these interrogatories the District Court prefaced his order sustaining plaintiffs' objections by the statement (Rec. Vol. 2, p. 864):

> "It seems that in the rule referred to by Judge James we have very logically set forth the proposition that a defendant seeking to present evidence or to acquire information relative to the state of the prior art may not call upon the plaintiff to undertake to furnish that information. It sounds to us as rather a—quite an extraordinary proposition."

The opinion of Judge James referred to by the District Court is that of *Miller & Pardee* v. *Lawrence A. Sweet Mfg. Co.*, 3 Fed. (2d) 198, wherein, with reference to the proper sphere and scope of interrogatories under Equity Rule 58, the Court said:

> "But there should be quite clear limits put to the scope of interrogatories which a party may propound to his opponent, admitting the allowance of the liberal rule stated. The interrogatories should not go to the length of examination and cross-examination on evidentiary matter, nor yet become a mere curious excursion, to find *whether the party interrogated may possibly know something* which will aid a cause or the defense to it. Interrogatories should be of such a character as that, by examining the issues proposed or made up, it can be seen that the answers required will reasonably state or illustrate a material fact. Interrogatories requiring a plaintiff, for instance, to *state whether he knows of any prior use* antedating his patent, asked in the hope that the defendant may discover valuable defense matter, belong to this class, and are improper." (Italics ours.)

The Memorandum Briefs in the Form of Letters From Counsel to the Court Were Neither Private Nor Prejudicial.

(Not an Appealable Matter.)

Defendant's counsel make much ado about two letters from plaintiffs' counsel to the District Court (Rec. Vol. 2, p. 291 and p. 941).

Plaintiffs' counsel have no apologies for these letters.

Neither was private nor secret; copies of both were sent to and received by defendant's counsel simultaneously with those sent to and received by the Court; each was justified by the circumstances which prompted it.

In order that this Court may be fully apprised of the circumstances we shall briefly review the events which preceded and, in the opinion of plaintiffs' counsel, not only justify but made necessary each letter.

Letter of November 12, 1931. (Rec. Vol. 2, p. 291.)

This letter was written by plaintiffs' counsel on the train returning to Chicago from the hearing of November 9. Due to some interruptions, necessitated by the District Court being compelled to hear other motions on its regular motion day, plaintiffs' counsel was unable to complete all of the contemplated argument-in-chief in support of the motion for preliminary injunction; defendant's argument had not been presented and consequently the hearing was continued to the next motion day, the following Monday, November 16.

Plaintiffs' counsel had an argument which had been set for November 17 before the Second Circuit Court of Appeals at New York, and which made it impossible for him to remain in Los Angeles until November 16 either to complete his argument or be present during the presentation of the defendant's case. Consequently, on the expressed understanding that the hearing would proceed in his absence on November 16, plaintiffs' counsel by this brief-like letter of November 12 merely completed the planned argument-in-chief on plaintiffs' behalf. A copy of this letter was simultaneously mailed to defendant's counsel and the fact that he received this copy before the hearing was resumed on November 16 is shown by the repeated reference to it during his argument on that day.

Thus this letter, which was nothing more than a memo-

randum brief in extension and completion of the opening argument on plaintiffs' behalf, was neither secret nor private; it was explicitly referred to and replied to by defendant's counsel in his argument on November 16. It was obviously intended to become and it did immediately become a part of the record in this cause. Surely documents filed in the record of a cause before a United States District Court cannot be considered either private or secret.

Letter of January 4, 1932. (Rec. Vol. 2, p. 941.)

This letter from plaintiffs' counsel to the District Court was in effect a reply brief. It was made necessary by and was solely in reply to the letter of December 31, 1931, from defendant's counsel to the District Court (Rec. Vol. 2, p. 940).

Defendant's counsel in his letter of December 31, 1931, was obviously attempting to induce the District Court to deny plaintiffs' motion for a preliminary injunction **without any consideration of its merits.** The suggestion or invitation thus summarily to dispose of plaintiffs' motion was based upon the unwarranted and wholly erroneous proposition that because the reference to the Master had been vacated the District Court should enter an immediate order denying the motion for a preliminary injunction,—obviously without any consideration of the merits of the motion.

The letter of plaintiffs' counsel was an emphatic expression of his objection to any such summary disposition of the case and an argument as to why the District Court should consider the motion on its merits and either grant or deny it upon its merits.

That this letter was neither private nor secret is shown from the fact that defendant's counsel received a copy of it and immediately dispatched a reply to the District Court (Rec. Vol. 2, p. 945) and by the fact that the letter was made of record in the cause.

The Vacation of a Reference to a Master Was Justified and Not Prejudicial to Defendant.

(This, of course, is not an Appealable Matter, at this time.)

From the outset defendant's counsel "suggested" that the case be referred to a Master—not to consider plaintiffs' motion for preliminary injunction but for disposition of the entire cause (Rec. Vol. 1, pp. 106, 140; Vol. 2, pp. 574, 733). At no time did the defendant formally apply for a reference; nor did the defendant ever make or offer to make any showing of either the necessity for or the desirability of a reference.

Indeed, counsel for the *defendant* himself did not even consent to proceed under the order of reference to a Master until eight days after the order was entered on December 15, 1931, when defendant's counsel (Mr. Blakeslee) telegraphed to plaintiffs' counsel, "Lunati *versus* Sommer. After conference with client have determined to proceed under order of reference" (Rec. Vol. 2, p. 93).

The District Court had repelled all such suggestions until on or about December 11, 1931,—after three days had been devoted to argument on the merits of plaintiffs' motion for preliminary injunction and after plaintiffs' counsel had taken two trips from Chicago to Los Angeles in connection with those arguments.

In this connection the following colloquy occurred between Court and counsel at the close of the last day of argument on December 1st (Rec., Vol. 2, pp. 817 to 819):

> "*The Court:* We find from our calendar some other motions in this same case, having to do with interrogatories and bill of particulars. We have no time to hear those and we would suggest to counsel, if they are going to be seriously urged, we shall want to hear oral argument upon the same. I would suggest in that connection that the entire proceeding go over for a later

date, and in the meanwhile we shall be studying the application for the preliminary injunction.

"*Mr. Hinkle:* I think that is perfectly proper, your Honor, because in all of these other motions there is nothing that involves this preliminary injunction question, only other matters that are of importance at final hearing.

"*Mr. Blakeslee:* We had them continued at our suggestion two weeks ago. There was no opposing counsel here, but we were gracious enough to do that.

"*The Court:* We suggest that those motions go over three weeks from this day; the same, likewise, of the matter of setting.

"*Mr. Blakeslee:* That will be the 22nd of December.

"*The Court:* I should say, rather, three weeks from yesterday, which will be December 21st.

"*Mr. Blakeslee:* December 21st; and also the matter of setting.

"*The Court:* Yes.

"*Mr. Blakeslee: Has Your Honor still any relaxation of mind on the question of a possible reference?*

"*The Court:* We were about to ask counsel for the other side: Yesterday, Mr. Hinkle, you said you did not believe this case could be tried within four days. Mr. Blakeslee indicated that the defense could put in its case within two days. What is your estimate as to the length of time the case will require on final hearing?

"*Mr. Hinkle:* The Orgill case took two weeks. When I say 'two weeks,' I mean two weeks of business days. I would suspect, from what I have seen here of this case, that defendant's counsel's estimate is exceedingly modest.

"*The Court:* Well, at any rate—

"*Mr. Hinkle:* I think it would take plaintiffs probably a day or a day and a half to put in a *prima facie* case, and then it would be up to the defendant; and, of course, how much time we would require for rebuttal would depend upon what they did.

"*The Court:* In the event that a hearing could be accorded next month, that is, January, would your side be ready?

"*Mr. Hinkle:* That I could not say. Mr. Williams will try that case, and I do not know. He is not here,

and would have to speak for himself. I should imagine so, but I cannot bind him on that.

"*The Court:* Will you see him within the next few days?

"*Mr. Hinkle:* I expect to.

"*The Court:* May we ask you to have him telegraph the court, indicating whether he could prepare to go to trial next month?

"*Mr. Hinkle:* Yes, I can do that, but in the meantime, I think that this—

"*The Court:* It may be that we can find some way; it may be that I may be relieved by the visiting judge who is likely to be here about the end of the month, that is, possibly be relieved long enough to hear this case.

"*Mr. Blakeslee: By the way, of course, we would rather have your Honor hear it, and particularly inasmuch as your Honor has gotten such a comprehensive picture.*

"*The Court:* What I have in mind is, that judge would take the other calendar.

"*Mr. Blakeslee:* In that connection, I spoke yesterday of that Otis Elevator case and I have since talked with Mr. Lane, communicated with him in Chicago, who is chief counsel in that case, patent counsel and, as I mentioned yesterday, Mr. Leonard Lyon said he felt he could not try that case on the 5th of next month, the time it is set. Now, your Honor said something about you did not think it could be reached. That case I presume would take a couple of weeks. That is another kind of elevator case, and Mr. Lane has said that he is willing to have this case stricken from the calendar, to be reset. Now, of course, that is a matter for your Honor to determine, but that would make some space there. That case might just be stricken from the calendar.

"*The Court:* No, as we indicated yesterday, we set two cases for the same time, having in mind some statement made to the effect that, by placing this case on the calendar and giving some indication that the defense was ready, perhaps it would bring the matter to the other side, the realization that the case was without merit and ought to be dismissed.

"*Mr. Blakeslee:* I do not know as we are capable of having that realization. I think it is of merit, but the

point is this: Suppose Mr. Lane comes here from Chicago, the 5th of next month, ready to try it, will the court be able to hear it?

"*The Court:* Now, we certainly do not expect to try that case. It was put on the calendar with the understanding it would merely serve that possibly essential purpose, but not if both sides were determined to go ahead, that we could hear it. Oh, no.

"*Mr. Blakeslee:* One reason for delaying that case was, there was litigation in the Second Circuit out of the same patent.

"*The Court:* Yes, you said you thought that would probably dispose of this. [The Otis case.]"

In response to the request of the District Court that plaintiffs' senior counsel "telegraph to the Court, indicating whether he could prepare to go to trial next month," plaintiffs' senior counsel sent the following telegram to the District Court on December 9, 1931 (Rec. Vol. 1, p. 314):

"Chicago, Illinois, December 9, 1931.
Honorable Harry A. Holzer, Judge,
United States District Court,
Post Office Building,
Los Angeles, California.

Pursuant to your request through Mr. Hinkle I have succeeded in readjusting my court engagements so that I can try the suit of Lunati vs. Sommer beginning any day after December 28 and including any day before January 19.

Signed: Lynn A. Williams."

Apparently, in spite of the desire and intention of the District Court to proceed with the trial of this case at the earliest possible date, defendant's counsel continued in some ex parte manner to repeat the suggestion of a reference to a Master and to discuss the matter of interrogatories, use of affidavits, etc., until, in desperation, the District Court on December 11 telegraphed plaintiffs' counsel as follows (Rec. Vol. 1, p. 284):

"December 11, 1932.

LYNN A. WILLIAMS, Attorney,
1315 Monadnock Block,
Chicago, Illinois.

Have arranged with Judge Bledsoe who served in this court for many years as Judge to act as Special Master hearing Lunati case beginning December 29 stop Defense requests Plaintiffs answer or object to Defendant's interrogatories by December 16 stop Believe this reasonable in view of early trial stop Defense states if answers to interrogatories not satisfactory depositions will be taken in San Francisco without delay stop Defense also requests affidavit of his expert on file be received as direct testimony with leave for Plaintiff to cross-examine pursuant to Rule 48 stop Please wire reply.

HARRY A. HOLZER,
U. S. District Judge."

To this telegram from the District Court plaintiffs' counsel replied by wire on December 12 as follows (Rec. Vol. 1, p. 285):

"1931 Dec. 12 P. M. 1221

RXCB 652 242 1/136 Chicago Illinois 12-21 OP
Hon. HARRY A. HOLZER, Judge,
United States District Court,
Main Post Office Building,
Los A.

Re Lunati vs. Sommers the Defendant has never pleaded any defense based upon the alleged prior use by Cochin of San Francisco and none can be made unless pleaded stop If this defense is now to be asserted we cannot possibly proceed with trial on December 29th or in January stop We certainly are entitled to notice and preparation for such a defense which presumably would have to be made and rebutted by depositions taken in San Francisco stop In my effort to adjust my engagements in such a way as to make possible a trial in January of the issues thus pleaded I have had to make irrevokable court engagements for December 17 and 18 in New York and December 22 in Detroit and would now be unable to attend San Francisco depositions before December 29 even if this defense had been pleaded investigated and noticed stop Plaintiffs only information relative to this unpleaded

> Cochin defense is untrue and unfounded hearsay upon which we cannot answer Defendant's interrogatories of our own knowledge nor in any way satisfactory for Defendant's purpose stop My engagement in Dayton on Monday and O'Brein's absence from his home in Memphis on a trip from which he is not expected to return until December 17 will make it impossible for us to file any answer to Defendant's interrogatories before December twenty-first as ordered on December 7th and as we were advised by telegram that day.
>
> Signed: LYNN A. WILLIAMS."

On December 15, 1931, the District Court made the order referring the entire cause to Honorable Benjamin F. Bledsoe as Special Master, copies of the foregoing telegrams between the Court and plaintiffs' counsel being attached thereto and made a part thereof (Rec. Vol. 1, pp. 282, 283).

On December 30th plaintiffs' motion to revoke the reference to the Special Master was heard by the District Court and, as a result of the objections raised on plaintiffs' behalf the Court vacated the order of reference and continued the case to January 11, 1932, for setting for final hearing before the Court (Rec. Vol. 1, p. 319).

Defendant never made nor offered to make the slightest showing—as distinguished from his counsel's unsupported and unverified statements—that the vacation or revocation of the reference to a Special Master would cause or had caused him the slightest inconvenience or hardship or that the delay in the trial before the District Court would cause or had caused him the slightest inconvenience or damage or had caused or resulted in any difference in his status. As a matter of fact, it would seem quite obvious that the longer the defendant could remain free to compete with the Rotary Lift Company and its licensees—the longer he could put off a possible injunction—the better would his position be and remain.

When the matter of this reference to a Master came to a head in December, 1931, the business depression of the

world had so affected Lunati and the Rotary Lift Company that they could not possibly meet the expense of proceeding before the Master and the expense of all of the arguments and briefs which would be entailed upon exceptions to the Master's report. This controllingly important reason why the plaintiffs could not proceed with the reference was not explained to counsel for the plaintiffs until he met Mr. O'Brien, president of the Rotary Lift Company, on the train at Kansas City while en route to Los Angeles for the hearings, which were set to begin on December 29th. These matters could not earlier have been brought to the attention of counsel for plaintiffs because of the fact that Mr. O'Brien was away from his office on a selling expedition at the time the reference was proposed by Judge Hollzer, and subsequently ordered on December 15th. These compelling reasons why plaintiffs could not proceed under the reference to the Master were fully explained to the Court in connection with the plaintiffs' motion to vacate the order of reference.

In this connection we quote without comment from the opinion of the United States Supreme Court in the mandamus case of *Los Angeles Brush Manufacturing Corporation* v. *William P. James,* 272 U. S. 701; 71 L. Ed. 481:

> "Rule 46 requires that in any trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or the rules, and that the court shall pass upon the admissibility of all evidence offered as in actions at law. Equity rule 59 provides that save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. These rules were adopted by this court after a thorough revision. Committees of the Bar from the nine different circuits were invited to assist the court in the matter. The court, after much consideration, concluded that the then method of taking evidence in patent, and other

causes in equity had been productive of unnecessary expense and burden to the litigants and caused much delay in their disposition, and that the effective way to avoid the making of extended records, unnecessary to a consideration of the real issues of the causes, was to require, so far as it might be possible and practicable, that the evidence taken in patent and other cases should be taken in open court, and that in only exceptional cases should the cause be referred after issue to a special master. Though there has been some criticism and complaint of the inconveniences that arise from this change of the rules, the court is strongly convinced that the change has justified itself and has no purpose to amend the provisions of rule 46 and rule 59. Were it to find that the rules have been practically nullified by a district judge or by a concert of action on the part of several district judges, it would not hesitate to restrain them. One of the causes for complaint of the general administration of justice is the expense it entails upon the litigants, and so far as it reasonably may do so, this court is anxious to minimize the basis for such complaints. There is no reason why a patent litigant should be subjected to any greater expense than any other litigant except as it may be involved in the inherent and inevitable difference between the presentation of the issues as to the merit and validity of a patent grant and that which obtains in the litigation of an ordinary bill for relief in equity or of an action at law upon a debt or for a tort.

"Of course, courts must exercise a discretion in reference to the order of business to be conducted before them, and all the cases can not be heard at once. It is in the interest of economy of time that there should be hearings, first in one class of cases, and then in another, provided each class may be given an opportunity within a reasonable time. Arguments based on humanity and necessity for the preservation of public order require that criminal cases should be given a reasonable preference, but even this must be conceded with moderation, and what time there is of the court in view of the whole docket must be equitably distributed. The reason given in the order for referring these cases to a special master is that there is congestion in the court's calendar and that there are many other cases entitled to be heard first, including a large

number of criminal causes which should be preferred over civil causes as to the trial thereof, that other civil litigation has not been accorded a fair proportion of the time of the court, and that the condition will continue unless many of the patent cases, including this cause, be disposed of by such a reference.

"In view of the recitals of the order, we are not inclined to infer that there has been any deliberate abuse of discretion in this matter or to hold that there may not sometimes be such a congestion in the docket as to criminal cases as would justify a district judge in not literally complying with the requirements of the two rules in question. There has been an emergency due to a lack of judges in some districts which we can not ignore. We shall therefore deny leave to file this petition, but are content to state our views on the general subject, with confidence that the district judges will be advised how important we think these two rules are, and that we intend, so far as lies in our power, to make them reasonably effective for the purpose had in view in their adoption."

Brief History of Rotary Lift Company's Business.

The Rotary Lift Company was organized March 26, 1925, with a capitalization of only $50,000, for the purpose of marketing Lunati lifts under an exclusive license under the patent in suit. It does not have and never has had any other business than that relating to the manufacture and sale of Lunati lifts. Between 1925 and 1929 the yearly quantities and money values of Lunati lifts manufactured and sold by it were as follows (Rec. Vol. 1, pp. 11-13).

Year	*Number Sold*	*Sales in Dollars*
1925	99	$ 48,160.25
1926	929	456,625.75
1927	1008	431,918.54
1928	1328	369,701.09
1929	3271	682,689.37

The Orgill suit was started on June 16, 1929. The defendant in the Orgill suit was a dealer in the Curtis lift, an automobile servicing lift manufactured by the Curtis Manufacturing Company of St. Louis, Mo., but the Curtis Company actually "assumed the expense and exercised the direction and control of the defense" (Final Decree—Plaintiff's Exhibit No. 17—Physical Exhibit).

The Orgill suit was tried before a Master from January 15 to 25, 1929 and on April 2, 1929, the Master filed a report finding claims 2, 3, 7 and 8 of the Lunati patent (the only claims there in suit) valid and infringed by the Curtis lift. The Master's report was confirmed on August 12, 1929 (Rec. Vol. 1, p. 617). The interlocutory decree was entered on October 4, 1929, and injunction issued on October 9, 1929.

Defendant's counsel erroneously asserts that the District Court in this Orgill suit expressed "grave doubt" of the validity of claims 2, 3, 7 and 8 of the Lunati patent, whereas the District Court expressed no such doubt. What the Court actually said was (Rec. Vol. 1, p. 529):

> "*It is a close question.* On the whole I am inclined to agree with the Master and treat the Lunati device as a novel combination of old elements ranking as invention. *After all, most machines are based on very well known mechanical laws and their operation and principle are very obvious indeed, once some inventor has put them into successful operation.*" (Italics ours.)

On October 19, 1929, the Curtis Company was granted a license which it had applied for under the Lunati patent (Rec. Vol. 3, p. 11-A) and on November 18, 1929, the final decree in the Orgill suit was entered.

The decree in this Orgill suit constitutes the prior adjudication of claims 2, 3, 7 and 8 upon which plaintiffs rely and base their right to a preliminary injunction against this defendant. However, some subsequent litigations and the results thereof do, we submit, have a strongly persuasive

effect in indicating the attitude of other competitive manufacturing concerns, toward the Lunati patent and their acquiescence in its validity.

Thus on February 19, 1930, suit was started in the Western District of Tennessee against the Oildraulic Lift Company. The Oildraulic Lift Company likewise applied for and was granted a license under the Lunati patent and consented to the entry of a final decree on February 27, 1930.

On April 7, 1930, suit was brought in the Southern District of Ohio against the Joyce-Cridland Company and that company secured a license under the Lunati patent, consenting to the entry of a final decree on February 2, 1931.

On January 2, 1931, licenses under the Lunati patent were secured by the following additional manufacturing concerns:

Globe Machinery & Supply Co., Des Moines, Iowa.
U. S. Air Compressor Company, Cleveland, Ohio.
John Cochin, San Francisco, California.
Lacer-Hallett Company, Los Angeles, California.
Hollister-Whitney Company, Quincy, Illinois.
(O'Brien Affidavit, Rec. Vol. 2, p. 207.)

Since the commencement of this suit additional licenses were secured by:

Manley Manufacturing Company (American Chain Company), Bridgeport, Connecticut.
Wayne Company, Fort Wayne, Indiana.
(O'Brien Reply Affidavit, Rec. Vol. 1, p. 207.)

The form of license under which each of these concerns operates is printed in the record, Vol. 3, beginning at page 11-B.

Under the terms of the license to these manufacturers each, among other things, pays to the Rotary Lift Company a royalty of ten dollars per lift, and agrees monthly

to report the number of licensed lifts sold and to pay the royalty due.

Whereas the Rotary Lift Company was a new concern, organized and capitalized solely for the purpose of manufacturing and selling the Lunati invention, these ten concerns were old, long established and wealthy organizations which for years had been leaders in the manufacture of other lines, such as Weed tire chains, hydraulic elevators, air compressors, hoisting equipment, plumbing fixtures, gasoline pumps and automobile accessories. Several of them are capitalized for millions of dollars. Together with the Rotary Lift Company, they have probably sold more than ninety per cent of all of the automobile servicing lifts which have gone into use since the advent of the Lunati patent.

The Rotary Lift Company has invested more than $250,000.00 in the Lunati patent. Up to the present time the Rotary Lift Company has not been able to pay any dividends or to reimburse its stockholders in any degree for the money invested by them in converting a very sceptical public to the idea that it was possible and feasible and safe and altogether desirable to service the under-body of an automobile by perching it at the top of a single hydraulic plunger six feet above the surface of the earth. It was only after a long period of "missionary work" that the automobile servicing public was convinced that the Lunati lift was the final and perfect solution of a long continued effort to provide access to the under-body of an automobile for service work of all kinds.

On February 19, 1931, suit was brought in the Western District of Missouri against the Clear Vision Pump Company. In this Clear Vision suit motion was made for a preliminary injunction, the motion was argued before Honorable Albert L. Reeves, District Judge for the Western District of Missouri on April 3, 1931, and, after filing ex-

tensive briefs, the motion was submitted on May 6, 1931. On September 28, 1931, an opinion favorable to plaintiffs was rendered and an order for preliminary injunction was entered on September 29, 1931 (Rec. Vol. 2, p. 254).

The Relation of the Parties to the Patent.

The Rotary Lift Company was organized in 1925 to manufacture and market automobile servicing lifts under the Lunati patent. Its initial capital was only $50,000 (O'Brien Affidavit, Rec. Vol. 1, p. 11).

It never has had any other business; deprived of the lift business it would have nothing on which to exist. Mr. Lunati, the patentee, has no appreciable income other than that derived from the royalties he receives from the Rotary Lift Company (O'Brien Affidavit, Rec. Vol. 1, p. 29).

In June, 1928, the Orgill suit was started against a dealer in lifts made by one of the country's oldest and largest elevator manufacturers, the Curtis Manufacturing Company of St. Louis, Mo. The Curtis Company actually controlled, directed and financed the defense in that suit. It was bitterly contested. Every issue raised here was raised there. The case was heard before the court's Standing Master from January 15th to January 25th, 1929. Passenger and freight elevators of many kinds and varieties, the Wood, Zimmerman and Appleton & McCoy patents and many others, alleged file-wrapper estoppel and double patenting were all paraded before the Master with great zeal and much emphasis. But the Master, in a report which consumes forty-six pages of this record, found claims 2, 3, 7 and 8 (which were the claims there in suit) valid and infringed (Master's Report, Rec. Vol. 1, pp. 469 to 515).

On exceptions to the Master's Report the same alleged defenses were again urged before the Court. But that re-

port was affirmed on August 12, 1929, by Judge Anderson of the District Court for the Western District of Tennessee, Western Division. On October 4, 1929, an interlocutory decree was entered finding claims 2, 3, 7 and 8 valid and infringed and on October 9, 1929, the injunction issued.

Prior to the entry of the interlocutory decree and the issuance of the injunction there had been no settlement or negotiations for a settlement of the Orgill suit. But afterwards (on October 19, 1929) the Curtis Company did negotiate and take a license and a final decree was entered by consent on October 18, 1929 (Answer to Defendant's Interrogatory No. 74, Rec. Vol. 1, p. 211).

This was but the beginning.

On February 19, 1930, suit was started against the Oildraulic Lift Company of Memphis, Tennessee. The Oildraulic Lift Company likewise applied for and took a license under the Lunati patent and on February 27, 1930, a consent decree in favor of plaintiffs was entered (O'Brien Affidavit, Rec. Vol. 1, p. 22).

On April 7, 1930, suit was started in the Southern District of Ohio, against the Joyce-Cridland Co. and White's Auto Machine & Parts Co. of Dayton. On February 2, 1931, a consent decree in favor of plaintiffs was entered in this suit (O'Brien Affidavit, Rec. Vol. 1, p. 24).

On February 19, 1931, the Clear Vision suit was started and on the same day a motion for a preliminary injunction was filed therein. Extensive affidavits and numerous exhibits were filed by both parties. The motion was argued before Honorable Albert L. Reeves, District Judge for the Western District of Missouri on April 3, 1931, briefs were filed by both parties and on May 6, 1931, the motion was finally submitted to the Court. On September 28, 1931, Judge Reeves rendered an opinion granting plaintiffs' motion and on September 29, 1931, an order for preliminary

injunction was entered; and the defendants are still under injunction (O'Brien Reply Affidavit, Rec. Vol. 1, p. 254).

On January 2, 1931, the Rotary Lift Company entered into a license agreement with eight of the sub-licensees heretofore mentioned and subsequently two other licensees, viz., Manley Manufacturing Co. of Bridgeport, Connecticut, and the Wayne Company, Fort Wayne, Indiana, became sub-licensees under the Lunati patent.

In excess of $250,000 had been spent by the Rotary Lift Company prior to March 23, 1931, in royalties to Mr. Lunati and in conducting litigation against infringers and in negotiating licenses under the patent in suit.

Two of the licensees of the Rotary Lift Company are located on the Pacific Coast, one at San Francisco and one at Los Angeles.

Obviously neither the Rotary Lift Company nor these licensees can continue to do business in competition with concerns who do not have to pay royalty and who, unlike the Rotary Lift Company and its sub-licensees, may sell lifts at cut-throat prices.

As long as unlawful competition, such as that offered by the defendant here, continues nothing but ruin faces the Rotary Lift Company and the lift business of its sub-licensees.

The defendant admittedly has other lines of business than the lift business. In addition to lifts, he manufactures and sells Hi-Pressure Greasing Equipment and Gasoline Dispensing Units. One of his advertising folders (Plaintiffs' Exhibit No. 23—Physical Exhibit) pictures air compressors and self-oiling car washers in addition to the infringing lift. Obviously defendant has a diversified business, only one branch of which is the infringing automobile servicing lift.

Defendant pays a high compliment to its Lunati lift when he states that his Hi-Pressure Greasing Equipment

"is practically useless unless the customer buying the same has first purchased an automobile hoist." But he does not say or even intimate that the "automobile hoist" must be of his own manufacture. Obviously his Hi-Pressure Greasing Equipment, etc., would be as useful with lifts manufactured by the Rotary Lift Company or one of its sub-licensees, as with lifts of his own manufacture.

On the one hand here are the plaintiffs (an inventor-patent owner and his licensee) who made all of the investment necessary to convince a skeptical public of the merits of the Lunati invention and now dependent entirely upon income derived from the invention of the Lunati patent. Under the law that patent granted to Lunati the exclusive right, for seventeen years, to manufacture, use and sell the thing covered thereby. The right granted by that patent is not merely to litigate; not merely to recover possible profits made by an infringer or damages sustained from infringement; not merely to grant licenses to whomsoever may ask for one. It is the right to exclude others from making, using or selling the patented device. Must Lunati and the Rotary Lift Company wait until each infringer has been brought to the bar of justice at final hearing before that right can be realized?

The law has been so established that that right to exclude should begin—does begin—when there has been an adjudication of validity after a final hearing in a contested case—unless new defenses are presented which are so cogent and convincing as to make it appear that a different conclusion would have been reached had they been presented in the earlier case.

Plaintiffs have such an adjudication.

On the other hand there is the defendant. With other lines of business to which he can look for income while awaiting the final hearing to prove if he can the merits, "**not only on paper but in the industrial world,**" of de-

fenses, the like of which—if not the identical defenses —have been passed upon and discredited by a Master and a Court after a long and bitterly contested trial, by another Court on a contested motion for preliminary injunction and, as to the admitted best of the so-called "new defenses," also by the Patent Office Examiners.

CONCLUSION.

In conclusion it is submitted:

1. That the District Court did not abuse its discretion in granting plaintiffs' motion for a preliminary injunction.

2. That nothing occurred during the proceedings which indicated any "peculiarly engendered bias" or "extreme bias and prejudice against appellant, coupled with abuse of discretion and want of comprehension" or "petulance" or "bias and prejudice and unfairness" on the part of the District Court.

3. That plaintiffs were not guilty of laches either in bringing suit after knowledge of infringement, or in moving for a preliminary injunction after bringing suit, or in the proceedings between the motion for preliminary injunction and the final submission thereof to the District Court.

4. That whatever delay was chargeable to plaintiffs or their counsel was the direct and necessary result of previous delays for which the defendant was wholly responsible.

5. That the District Court did not abuse its discretion in vacating the reference to a Special Master for the trial of the cause.

6. That the District Court was right in presuming claims 2, 3, 7 and 8 of the Lunati patent to be valid

because no new and cogent defense was presented to overcome the presumption of validity arising from the Orgill suit.

7. That the District Court was right in finding that defendant's lift infringed claims 2, 3, 7 and 8 of the Lunati patent.

8. That the order of the District Court should be affirmed.

9. That this Court should not be influenced by the defendant's discussion of the many "assignments of error" relative to which this Court has no jurisdiction upon such a 30 day appeal as was taken in this case.

Respectfully submitted,

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ROSS O. HINKLE,
Counsel for Plaintiffs-Appellees.

Lynn A. Williams
Charles M. Fryer
Ross O. Hinkle
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Solicitors & Counsel
for Appellees

APPENDIX.

Brief descriptive analysis of each of the 35 alleged defenses submitted in opposition to the motion for preliminary injunction; also a chart comparison of claims 2, 3, 7 and 8 of the Lunati patent and these 35 alleged defenses.

Brief Analysis of Prior Art.

Hyde 216,326 (Rec. Vol. 3, p. 47). This patent discloses a dry dock for lifting vessels from the water and comprising a cradle (Fig. 4) adapted to lie below and support the keel of the vessel. This cradle is *suspended* by *four* combined screw and hydraulically actuated jacks or "presses," one at each corner of the cradle, for *pulling up* the cradle and the vessel supported thereon.

The device was neither intended nor adapted for the servicing of automobiles nor would it be capable of such use.

The hydraulic pistons are incapable of rotation, they are not provided with parallel or any other variety of vehicle supporting rails, they have no stops for limiting upward movement or insuring lateral rigidity when raised and the cylinders are not adapted to be, and as constructed and intended to operate could not be embedded in the ground.

Milliken 243,391 (Rec. Vol. 3, p. 57). This patent shows one of the almost countless varieties of ordinary passenger and freight hydraulic elevators. When equipped with a cage or platform, as intended, for passengers or freight the plunger is incapable of rotation, it has no parallel vehicle supporting rails and no stop for limiting the upward movement thereof and lending lateral rigidity thereto when elevated. When raised by such an elevator the underbody of an automobile would be *less* accessible than if the automobile stood on the ground.

Baumgarten 302,880 (Rec. Vol. 3, p. 61). This patent shows merely one of a wide variety of hydraulic presses. As used the plunger has no stop for limiting upward movement or lending lateral rigidity thereto. Neither is the press plunger provided with spaced parallel rails or any other variety of "vehicle supporting means."

Tucker & Keegan 390,920 (Rec. Vol. 3, p. 67). This patent shows a hydraulic bridge for supporting fire-hose over streets or railway tracks to prevent the hose from blocking traffic. The bridge work is carried by two hydraulically actuated telescopic "standards," one at each end of the bridge work.

The device has no rotatable plunger, no parallel rails for or capable of supporting a vehicle for servicing or any other purpose, no stop for limiting the upward movement of and lending rigidity to the plunger and the plunger cylinder is not intended to be placed or arranged for placement in the earth.

Caldwell 569,574 (Rec. Vol. 3, p. 73). This patent shows an example of a type of small portable hydraulic jack adapted and intended for use in the laying and maintenance of railway rails, *i. e.*, a "track jack." Such jacks are, of course, neither intended nor adapted for operation while embedded in the ground; nor are they provided with parallel rails or any other means for supporting a vehicle. Only a few inches of movement are all that is required of or attainable with such a jack.

Sonnex 625,425 (Rec. Vol. 3, p. 119). This patent shows one of countless varieties of barber and dental chairs. Of course, such chairs are neither adapted nor intended to be embedded in the ground; nor do they have vehicle supporting rails or other vehicle supporting means of any variety.

Holtz 628,244 (Rec. Vol. 3, p. 127). This patent, like the Sonnex patent, shows one form of dental or barber chair.

The only feature in common between barber or dental chairs and vehicle servicing lifts of the Lunati type is the idea of utilizing fluid pressure to elevate a plunger.

Dutton 635,848 (Rec. Vol. 3, p. 81). The device shown in this patent is an automatic shock absorber or check for hydraulic cylinders such as used in elevators, etc. The device is not intended nor adapted for lifting. It has no rotatable plunger, no vehicle supporting rails and no cylinder adapted or intended to be embedded in the ground.

Wood 657,148 (Rec. Vol. 3, p. 201). This patent constituted one of the principal defenses in the Orgill and Clear Vision suits as well as in this suit. Furthermore, it was considered by the Patent Office Examiners during the prosecution of the Lunati application and the claims in suit were allowed thereover.

Inasmuch as this patent has heretofore been discussed in considerable detail (see *supra,* p. 76) it will not again be discussed here.

Cowley 744,906 (Rec. Vol. 3, p. 137). This patent, like those to Baumgarten and Holmes, discloses a hydraulic press. The plunger has no stop, no parallel vehicle supporting rails or any other kind of vehicle supporting means and is prevented from rotating.

Holmes 753,261 (Rec. Vol. 3, p. 91). This patent, like the Baumgarten and Cowley patents, shows a variety of hydraulic press. The structure was neither intended nor is it adapted to lift automobiles for servicing or any other purpose, it has no parallel rails or other vehicle supporting means and no stop for the plunger.

Sherrill 804,060 (Rec. Vol. 3, p. 213). This patent relates to a wheeled truck for handling baggage, bricks and the like, the truck being provided with a small platform lift to raise small wheeled dollies carried thereby to the level desired for loading and unloading. The device was neither intended nor adapted for automobile servicing nor is it

capable of such use. It has no parallel unobstructed vehicle supporting rails nor a stop for limiting upward movement of the plunger and lending lateral rigidity thereto.

Gearing & McGee 877,709 (Rec. Vol. 3, p. 221). This patent discloses the earliest attempt at the provision of an automobile servicing lift. Like the Zimmerman patent, however, this lift does not have a single centrally disposed rotatable supporting plunger, but **four** plungers, one adjacent each corner of the automobile. The rails can not be rotated nor are they free from extraneous elements which would interfere with underbody accessibility. This patent, together with the five others showing prior attempts to accomplish Lunati's purpose, has been fully discussed in one of the earlier sections of this brief (*supra*, p. 83).

Steedman 932,726 (Rec. Vol. 3, p 97). This patent shows another variety of ordinary platform or cage elevator for freight or passengers. Like the Milliken patent it does not show parallel vehicle supporting rails or a stop for limiting the upward movement of and lending lateral rigidity to the cage or platform supporting plunger. Rigidity is secured by the cage or platform guides. As used in the manner contemplated the plunger is incapable of rotation.

Baker 957,536 (Rec. Vol. 3, p. 227). This patent relates merely to a small portable jack "for lifting one of the axles of the automobile so as to raise one pair of wheels temporarily off of the ground, and supporting said wheels on a castor or truck support which is capable of movement in various directions, enabling the automobile to be swung around on the other pair of wheels as a center." (Patent, page 1, lines 15 to 22.) The jack was neither intended for nor is it capable of bodily lifting an entire automobile. The jack does not have parallel vehicle supporting rails nor any other means for bodily lifting an automobile nor a plunger stop to limit upward movement and impart lateral

rigidity thereto. Many varieties of just such jacks were in common use long prior to Lunati's invention; but they were incapable of serving the purpose of the Lunati lift.

Turner 968,501 (Rec. Vol. 3, p. 103). This patent shows a circular platform lift for "use in loading and unloading baggage and freight"; it was not intended and it is not adapted for automobile servicing purposes. An automobile elevated on this device would be less accessible than when standing on the ground. The plunger is incapable of rotation, is not supplied with parallel vehicle supporting rails and has no stop for limiting its upward movement and insuring lateral rigidity when raised.

Zimmerman 986,888 (Rec. Vol. 3, p. 233). This patent, like the Gearing & McGee patent, shows one of the efforts which preceded Lunati for accomplishing Lunati's purposes. Like the Gearing & McGee patent it shows a *four post* lift incapable of rotation and not affording ready access to the underbody of an automobile supported thereon. This patent has heretofore been discussed in detail (*supra,* p. 75).

Appleton & McCoy 1,002,797 (Rec. Vol. 3, p. 311). This patent, like the Wood and Waters patents, shows a "pit jack" adapted to facilitate the removal and replacement of the wheels of railway cars and locomotives. It has neither parallel nor rotatably mounted vehicle supporting rails. This patent was previously discussed at some length (*supra,* p. 81).

Bauman 1,087,424 (Rec. Vol. 3, p. 187). This patent relates to a vehicle servicing lift intended for the accomplishment of the same purposes as the Lunati lift. The rails, however, are mounted upon a large turntable, which turntable is elevated by *four screw actuated jacks.* Such a device would be expensive to build, install and maintain, would require an excessive amount of power for its operation and, not being actuated by fluid pressure, could not

be operated by the ordinary service station air compressor. This patent shows one of the unsuccessful efforts, which preceded Lunati, to provide a satisfactory automobile servicing lift.

Pieper 1,137,080 (Rec. Vol. 3, p. 147). This patent shows another modification of the ordinary dental or barber chair. The device has no cylinder adapted to be embedded in the ground, no parallel vehicle supporting rails or other vehicle supporting means and no stop for the plunger.

Koken 1,178,733 (Rec. Vol. 3, p. 155). Another barber or dental chair patent.

Eide 1,185,640 (Rec. Vol. 3, p. 191). This patent relates to a turntable which is neither adapted to be elevated nor capable of any elevation whatever. The turntable has neither a plunger nor a cylinder nor any other arrangement for elevating an automobile or anything else.

This patent was considered by the Patent Office Examiner during the prosecution of the application for the Lunati patent and the claims allowed thereover.

Gates 1,188,063 (Rec. Vol. 3, p. 111). This patent, like the Baumgarten and Holmes patents, shows a variety of hydraulic press. The Gates press is particularly designed and intended for use in molding machines; it has no parallel vehicle supporting rails, no stop for the plunger and the plunger, when elevated, cannot be rotated.

Rawlings 1,213,012 (Rec. Vol. 3, p. 115). This patent discloses a small portable jack, like the ordinary jack carried by all automobiles, except that it is operated hydraulically instead of by the usual rack and pawl or screw and worm. It is only intended to be and can only be used to elevate one axle of an automobile a few inches. The plunger of this little jack has no vehicle supporting rails, is incapable of rotation, has no stop, and its cylinder is neither intended nor adapted to be embedded in the ground.

Rebmann & Hultgren 1,235,384 (Rec. Vol. 3, p. 167). Another barber or dental chair patent.

Wagner 1,389,403 (Rec. Vol. 3, p. 241). This patent discloses another lift along the same lines as the lifts of the Gearing & McGee and Zimmerman patents, *i. e.*, a *four post* non-rotatable, impractical and ineffective device. (*Supra.* p. 83.)

Healy 1,398,132 (Rec. Vol. 3, p. 195). This patent shows a small portable hand operated screw jack only intended by the patentee for "simultaneous lifting all of the wheels of the vehicle clear of the ground . . . thus providing a portable turntable." The small portable jack has no cylinder and no plunger of a hydraulic or pneumatic type and it would be wholly incapable of accomplishing the purposes of the Lunati or the defendant's lifts.

Lightner & Holmes 1,398 331 (Rec. Vol. 3, p. 247). This patent shows a device essentially like the *four post* lifts of the Gearing & McGee, Zimmerman and Wagner patents, although it was not intended by its inventor to be an automobile underbody servicing device. It was intended merely to serve as an elevator for raising an automobile so that a small wheeled transporting truck might be moved thereunder. The hoist was neither intended nor designed to rotate and is incapable of rotation.

Koenigkramer 1,488,206 (Rec. Vol. 3, p. 179). Still another barber or dental chair patent.

Cleveland 1,494,588 (Rec. Vol. 3, p. 257). This patent shows another effort to accomplish Lunati's purpose. Like the Gearing & McGee, Zimmerman, Wagner and Lightner & Holmes patents it shows a *four post* non-rotatable device.

Hose 1,525,447 (Rec. Vol. 3, p. 265). This patent shows still another *four post* non-rotatable servicing lift. The lift is essentially the same as the lifts disclosed in the Gearing & McGee, Zimmerman, Wagner, Lightner & Holmes and Cleveland patents.

Waters Reissue 16,989 (Rec. Vol. 3, p. 279). This patent, like the Wood and Appleton & McCoy patents, discloses a "pit jack" designed and intended only to facilitate the application and removal of the wheels of railway cars and locomotives. The structure is wholly incapable of use as an automobile servicing lift. It has no parallel vehicle supporting rails carried by a centrally disposed plunger.

Lyndon Affidavit Sketch X—Athens, Ga., Hydraulic Press (Rec. Vol. 3, p. 309). This device, which defendant's expert Lyndon claimed was used at Athens, Georgia, as early as 1895 is essentially the same as the presses disclosed in the Baumgarten and Holmes patents. Of course, the device was neither intended nor adapted for automobile servicing work nor is it capable of such use. The device had no parallel vehicle supporting rails.

Publication Referred to by Lyndon. Exhibit 1-A to 8-A (Rec. Vol. 3, p. 2). Another variation of the ordinary hydraulic or pneumatic passenger and freight elevator. This device was previously discussed at some length. (*Supra*, p. 74.)

Otis Elevator—Exhibit A—Copes Affidavit (Rec. Vol. 3, p. 1). Merely another variety of passenger and freight elevator. Incapable of accomplishing Lunati's purpose. Heretofore discussed at some length. (*Supra*, p. 73.)

The following charts afford a quick and easy comparison between each claim in suit and all of the 35 alleged defenses.

Each of claims 2, 3, 7 and 8 is separated into its several features and elements; and the presence or absence of each such element and feature in each alleged defense is indicated,—absence by a red "NO" and presence by a black "YES."

LUBATI NO. 1,552,326

CLAIM 2

	Waters Re. 16,989	Hyde 216,326	Milliken 243,391	Baumgarten 302,880	Tucker 390,920	Caldwell 569,574	Sonnex 625,425	Holtz 628,244	Dutton 635,848	Wood 657,148	Cowley 744,906	Holmes 753,261	Sherrill 804,060	Gearing & McGee 877,709	Steedman 932,726	Baker 957,536	Turner 968,501	Zimmerman 986,888	Appletoo & McCoy 1,002,797	Bauman 1,087,424	Pieper 1,137,080	Koken 1,178,733	Eide 1,185,640	Gates 1,188,063	Rawlings 1,213,012	Rebmann 1,265,384	Wagner 1,389,403	Bealy 1,398,132	Lightner & Holmes 1,398,331	Koenigkramer 1,488,206	Cleveland 1,494,588	Hosa 1,525,447	Lyndon Affidavit - Skatch X	Publication referred to by Lyndon	Otis Elevator - Copes Affidavit - Exhibit A
A vehicle lifting device comprising	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	YES	NO	YES	NO	YES	YES	NO	NO	NO
a hollow casing,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	YES (4)	YES (4)	YES	YES	YES
means for admitting fluid pressure thereto,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	YES (4)	YES (4)	YES	YES	YES
a single vertically movable end rotatable piston mounted in said casing,	YES	NO	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	YES	NO	NO	YES	NO	NO	YES	NO	YES	YES	NO	NO	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO
vehicle supporting means mounted on said piston, and	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
a stop on said piston for limiting the upward movement thereof.	YES	NO	NO	NO	NO	YES	YES	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	NO	NO	NO	NO	NO	YES

LUNATI NO. 1,552,326

CLAIM 3

	Waters Re. 16,989	Hyde 216,326	Milliken 243,391	Baumgarten 302,880	Tucker 390,920	Caldwell 569,574	Sonnex 625,425	Holtz 628,244	Dutton 635,848	Wood 657,148	Cowley 744,906	Holmes 753,261	Sherrill 804,060	Gearing & McGee 877,709	Steedman 932,726	Baker 957,536	Turner 968,501	Zimmerman 986,888	Appleton & McCoy 1,002,797	Beuman 1,087,424	Pieper 1,137,080	Koken 1,178,733	Elde 1,185,640	Gates 1,188,063	Rawlings 1,213,012	Rebmann 1,265,384	Wagner 1,389,403	Healy 1,398,132	Lightner & Rolmes 1,398,331	Koenigkramer 1,488,206	Cleveland 1,494,588	Hose 1,525,447	Lyndon Affidavit - Sketch X	Publication referred to by Lyndon	Otis Elevator - Copes Affidavit - Exhibit A
A vehicle lifting device comprising	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	YES	NO	YES	NO	YES	YES	NO	NO	NO
a vertical cylinder,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES	NO	YES (4)	YES	YES (4)	YES (4)	YES	YES	YES
a piston mounted to reciprocate therein,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	NO	YES (4)	YES	YES	YES
means for supplying fluid pressure to said cylinder to lift said piston,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	NO	YES (4)	YES	YES	YES
a supporting member carried by the upper end of said piston,	YES	YES	YES	YES	YES (2)	NO	YES	YES	NO	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	NO	YES (4)	YES	YES	YES
a pair of spaced parallel rails arranged on opposite sides of said supporting member, said member being provided with outwardly diverging portions secured at their ends to said rails near the centers thereof, said rails being relatively long and free from extraneous elements from their ends to the diverging portions of said supporting member.	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO

LUNATI NO. 1,552,326

CLAIM 7

	Waters Re. 16,989	Hyde 216,326	Milliken 243,391	Baumgarten 302,880	Tucker 390,920	Caldwell 569,574	Sonnex 625,425	Holtz 628,244	Dutton 635,848	Wood 657,148	Cowley 744,906	Holmes 753,261	Sherrill 804,060	Geering & McGee 877,709	Steedman 932,726	Baker 957,536	Turner 968,501	Zimmerman 986,888	Appleton & McCoy 1,002,797	Bauman 1,087,424	Pieper 1,137,080	Koken 1,178,733	Elde 1,185,640	Gates 1,188,063	Rewlings 1,213,012	Rebmann 1,265,384	Wegner 1,389,403	Beely 1,398,132	Lightner & Holmee 1,398,331	Koenigkramer 1,488,206	Cleveland 1,494,588	Rose 1,525,447	Lyndon Affidevit - Sketch X	Publication referred to by Lyndon	Otis Elevator - Copes Affidavit - Exhibit A
A vehicle lifting device comprising	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	YES	NO	YES	NO	YES	YES	No	NO	NO
a vertical cylinder adapted to be embedded in the earth and provided with an open upper end,	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	YES	YES
a piston mounted to reciprocate in said cylinder and projecting from the upper end thereof,	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	YES	YES
a gland secured to the upper end of said cylinder and surrounding said piston, the surface of the earth in which said cylinder is embedded being provided with a relatively small shallow depression in which said gland is arranged,	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
means for supplying fluid pressure to said cylinder to lift said piston,	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	YES	YES
a support carried by the upper end of said piston, and	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	YES	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	NO	NO	YES (4)	NO	NO	NO	NO	NO	NO	YES	YES
spaced parallel rails secured to said support, said rails projecting a substantial distance beyond said depression and being supported on the surface of the earth when said piston is in lowered position.	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO

LOBATI NO. 1,552,326

CLAIM 8

	Weters Re. 16,989	Hyde 216,326	Milliken 243,391	Baumgarten 302,880	Tucker 390,920	Caldwell 569,574	Sonnex 625,425	Holtz 628,244	Dutton 635,848	Wood 657,148	Cowley 744,906	Holmes 753,261	Sherrill 804,060	Geering & McGee 877,709	Steedman 932,726	Baker 957,536	Turner 968,501	Zimmerman 986,888	Appleton & McCoy 1,002,797	Bauman 1,087,424	Pieper 1,137,080	Koken 1,178,733	Eide 1,185,640	Gates 1,188,063	Rawlings 1,213,012	Rebmann 1,265,384	Wagner 1,389,403	Healy 1,398,132	Lightner & Holmes 1,398,331	Koenigkramer 1,488,206	Cleveland 1,494,588	Hose 1,525,447	Lyndon Affidavit - Sketch X	Publication referred to by Lyndon	Otis Elevator - Copee Affidavit - Exhibit A
a vehicle lifting device comprising	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	YES	NO	YES	NO	NO	NO	NO	NO	NO	YES	NO	YES	NO	YES	YES	NO	NO	NO
a vertical cylinder,	YES	YES (4)	YES	YES	YES (2)	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES (4)	NO	YES (4)	YES	YES (4)	YES (4)	YES	YES	YES
a piston mounted to reciprocate in said cylinder, the lower end of said cylinder being slightly greater in diameter than said piston, the upper end of said cylinder being of the same diameter as and adapted to snugly receive said piston,	YES	NO	NO	NO	NO	YES	YES	NO	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	YES	NO	NO	NO	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO
a projection carried by the lower end of said piston and extending outwardly therefrom,	YES	NO	YES	NO	NO	YES	YES	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	YES	YES	NO	NO	NO	NO	NO	NO	NO	NO	NO
means for supporting a vehicle on the upper end of said piston, and	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO
means for supplying fluid pressure to said cylinder to lift said piston.	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES (4)	YES	YES	YES	YES (4)	YES	NO	YES	YES	NO	YES	YES	YES	YES	NO	YES (4)	YES	YES (4)	YES (4)	YES	YES	YES

No. 6847.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman C. Sommer,
Defendant-Appellant,
vs.
Rotary Lift Company and Peter J. Lunati,
Plaintiffs-Appellees.

REPLY BRIEF OF APPELLANT.

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TOPICAL INDEX.

INDEX OF AUTHORITIES.

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REPLY BRIEF OF APPELLANT.

OPENING STATEMENT.

At the commencement of the argument on this appeal, appellant asked permission to file a short reply brief. Your Honors did not refuse this request, but asked that appellant's counsel make his argument upon the assumption that such reply brief would not be necessary. Matters developed upon the careful perusal and checking of appellees' brief, which had not been possible within the three days before argument subsequent to its service, and certain developments on the argument, have convinced appellant's counsel of the wisdom and propriety, if not necessity, of presenting such reply brief, and the latter has, therefore, been carefully formulated and reduced to

the smallest possible dimensions and is being filed with the clerk coupled with the request that he obtain Your Honors' permission for its receipt and consideration. Appellant's counsel feels that appellant will be prejudiced unless this course be pursued. Among other reasons is the fact that upon argument counsel for appellees grossly misrepresented the law and state of the authorities when he said that there are no authorities warranting this Court in ordering the bill of complaint dismissed because of invalidity of the Lunati patent in suit. On the contrary, *the Supreme Court has so held* and many cases in this and other circuits justify such procedure. We only ask this Court to do what the Supreme Court has done.

Under the head of Comity there is cited and analyzed, in our opening brief, page 171, the case of *Mast, Foos and Co. v. Stover Mfg. Co.,* 177 U. S. 485. Thus, there is endless authority for this Court doing what appellant requests, to wit, reversing the order of the lower court, *and in addition ordering the bill dismissed because of invalidity of the Lunati patent for want of invention over the prior and analogous arts, as well as for actual anticipation, and, also, as previously urged, for want of infringement.*

The decision of this Court in *Rip Van Winkle v. Murphy,* 1 Fed. (2d) 673, cited at page 9 of our opening brief, is authority supporting the general rule that an appellate court may order a bill in a patent suit dismissed on an appeal such as that at bar. It was so relied upon by us. The Mast-Foos case, *supra,* was relied upon under the doctrine of comity, and also for everything else that it decided, including the finding against validity of the patent in suit, and the confirming of the order of the ap-

pellate court, which in turn ordered the lower court to dismiss the bill *because of want of invention,* in an appeal from an order granting a preliminary injunction.

Furthermore, courts of equity at all times have and retain the power to strike down any patent *suo sponte* when it is made to appear or shall appear that the patent in suit is void, and on this we have cited the law extensively in our opening brief.

Also, we find specific misrepresentations and misstatements and improper matter in appellees' brief which require specific challenging, and are likewise giving attention to the quotations in that brief advanced by appellees.

Mr. Williams, on argument, stated that we had included in our answer no new defenses. About one-half of the prior art patents set up by us were not considered and not pleaded in the Orgill case, the only prior adjudication of the Lunati patent, and in which the court found the question of validity a "close question." Also, the Zimmerman patent we set up, and which negatives any otherwise possible invention by Lunati, allowing full access to the underside of the elevated automobile, was not considered or cited by the Patent Office in the prosecution of the Lunati patent application.

Furthermore, Attorney Williams has conceded clearly, on argument, the want of invention in the Lunati patent. We call attention to the transcript of such argument to be filed with this Court. The attempt of Attorney Williams to demonstrate the genesis of the alleged "invention" of Lunati would have been pathetic could it have been sincere. He stood in front of Your Honors and visualized Lunati, exercised to the point of snapping his

fingers (responsive to "inspiration" wrung from the rise and fall of an hydraulic elevator), and, his face in a glow, exclaiming in substance:— "By golly! I could lift automobiles on that, not only just to lift them but to stand and work under them when lifted (just as one can in using the Zimmerman patent of which the law charges me with notice), *only,* I'll use the single piston just like this elevator I am looking at." And, with face radiant with this sad auto-hypnosis, this man, who imagined a streak of lightning of divine afflatus had struck him, applied for patent, but the "creative act" began nowhere and went nowhere. Attorney Williams conceded on argument that there could be no invention in the "idea" alone of using an old hydraulic lift for another purpose (and that is elementary law), and coupled it up, under continued prodding, with a *stressed* concession, an emphatic and grovelling concession, that the *means* of the Lunati patent, constituting the vehicle of this old and unpatentable idea, could have been involved by not only a mechanic, without invention, but by a *most ordinary* mechanic. Were it necessary or not, opposing counsel before Your Honors, as he was forced by fact and law to do, has admitted Lunati invented nothing. There was no conception. Attorney Williams spoke of what he called the literary view of the matter. It would not do for the first paper and pencil effort in a kindergarten.

We should now like to address ourselves specifically to this very important matter, made so important by the misrepresentation of opposing counsel, to-wit, that this court can strike down the Lunati patent upon the obvious want of invention in its disclosures and claimed matter, and order the bill dismissed.

Law Fully Warrants Order Dismissing Bill, the Facts Being Sufficient.

The Supreme Court of the United States has definitely settled the proposition that where an appeal is taken from an order granting a preliminary injunction upon affidavits, the Circuit Court of Appeals may reverse such order and at the same time direct a dismissal of the bill if it be found devoid of equity upon its face, or if the patent is void for want of invention or found anticipated, or if non-infringement be made out. The case to which we refer, and which we included in appellant's opening brief, was decided early in 1900, opinion by Mr. Justice Brown, and since that time has been cited in practically every case dealing with the scope of review upon appeals from the allowance or refusal of injunctions *pendente lite*. The case furthermore is strikingly similar to the case at bar, and for that reason we shall take the liberty to deal with it *in extenso:*

Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 S. Ct. 709, 44 L. Ed. 856.

This case came before the Supreme Court on a writ of *certiorari* to review a decree of the Circuit Court of Appeals dismissing a bill in equity for infringement of letters patent, and appealed to that court from an order of the Circuit Court for the Northern District of Illinois granting a preliminary injunction. The decision of the Circuit Court is reported in 85 Fed. 782, and of the Circuit Court of Appeals in 89 Fed. 333. The facts gleaned from these two reports and from the statement of the case made by Mr. Justice Brown speaking for the Supreme Court, are as follows:

The bill, filed by the petitioner, Mast, Foos & Co., was for infringement of letters patent No. 433,531 for an improvement in windmills, granted to petitioner upon an application of one Samuel W. Martin. Motion was thereafter made, upon a showing of *ex parte* affidavits, for a preliminary injunction. It seems that the patent had been previously found valid by the Circuit Court of Appeals for the Eighth Circuit, and a device almost precisely like that of the defendant was held to be an infringement. District Judge Grosscup felt himself constrained to follow that prior adjudication unless the new defenses were so cogent and persuasive as to impress the court with the conviction that had they been presented and considered in the former case, the decision there would have been other than it was. Judge Grosscup did not think that was the case, and proceeded to enter an order for a preliminary injunction against the defendant Stover Mfg. Co., and thereafter an appeal was perfected to the Circuit Court of Appeals for the Seventh Circuit. Circuit Judge Woods delivered the opinion for that court. Appellee, first of all, urged that no review would be made on the issue of validity inasmuch as validity had been sustained by the appellate court for the Eighth Circuit. In respect to such contention, Judge Woods said (89 Fed. 333, p. 336):

> "The decisions touching the practice on appeals from interlocutory orders, under the judiciary act of 1891, have not been in entire harmony; but in the recent case of Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, where the decisions touching the subject are collected, the supreme court has defined clearly the scope of the review which the act was intended to authorize. After declaring that

the appeal, which by section 7 of the act may be taken from an 'interlocutory order or decree granting or continuing such injunction,' is an appeal 'from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction,' the court proceeds to say that the manifest intention of the provision was *'not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interest, but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.'* The comprehensive terms of this expression forbid the suggestion that it does not apply when the appeal is from an order made upon affidavits, and not from a decree ordering both an injunction and an accounting, entered as the result of a hearing upon full proofs. If there is ground for a distinction in that respect, it is in favor of the appeal from a preliminary order made upon *ex parte* and imperfect showings at the commencement of litigation, rather than an appeal from an injunction perpetual in terms granted after a full hearing, which is called interlocutory only because there remains to be taken an accounting, upon which the evidence adduced cannot ordinarily affect the injunction. This being the scope of the appeal, the logical inference would seem to be that every application to a circuit court for an injunction or temporary restraining order should be considered on its merits, *and that a ruling or opinion of another court upon any question involved should be given only its just and reasonable weight according to the circumstances.* The statute gives the right of appeal; the supreme

court has determined that the review, so far as may be, shall extend to the merits; and it is not consistent to say that the decision of an inferior court must be pronounced on one basis and reviewed on another." (Italics herein generally ours.)

The court next considered the mechanical aspects of the case, and observed that the substitution of an internal for an external toothed spur wheel in connection with the driving shaft of a windmill, producing only improved effects long known to mechanics to be the result of using that form instead of other forms, involved no invention. In respect to such internal gearing, the court remarked (p. 340):

"* * * It had been in use in windmills side by side with the external wheel, and if, as employed in the Martin combination, it served a use which, in any sense, was new, it was, in the language of the opinion in Potts & Co. v. Creager, 'so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill.'"

In conclusion the court said (p. 340):

"It is not perceived that further proofs are possible of a character to change the result. The decree or order below is therefore reversed, with directions to dismiss the bill for want of equity."

From this decision of the Circuit Court of Appeals, *certiorari* was taken to the Supreme Court, pursuant to which Mr. Justice Brown upheld the appellate court in the exercise of its powers in holding the patent void for want of patentable invention and in dismissing the bill of complaint. We will now refer to and quote from that

opinion, which has placed the Mast, Foos decision in the enviable classification of leading cases.

The court, through Mr. Justice Brown, first addressed itself to the question of comity. We have dealt with this feature of the case extensively in appellant's opening brief, and will not again refer to it here. The court next undertook a consideration of the features of the patent in suit and the mechanics involved. It appears that the Martin (patentee) combination had previously been used in a large number of mechanical devices for the purpose of converting a rotary into a reciprocating motion, as was evidenced in several prior art patents, but had not been used for such purpose in windmills. In referring to this proposition and to the patentee Martin, we can do no better than to quote the court directly, (177 U. S. 485, p. 493):

> "Having all these various devices before him, and, whatever the facts may have been, he is chargeable with a knowledge of all pre-existing devices, did it involve an exercise of the inventive faculty to employ this same combination in a windmill for the purpose of converting a rotary into a reciprocating motion? We are of opinion that it did not. * * * Martin, therefore, discovered no new function, and he created no new situation, except in the limited sense that he first applied an internal gearing to the old Mast-Foos mill, which was practically identical with the Martin patent, except in the use of an internal gearing. He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply it to a new purpose in a machine where it had not before been used for that purpose. The result may have added to

the efficiency and popularity of the earlier device, although to what extent is open to very considerable doubt. In our opinion this transfer does not rise to the dignity of invention. We repeat what we said in Potts v. Creager, 155 U. S. 597, 608, sub nom. C. & A. Potts & Co. v. Creager, 39 L. ed. 275, 279, 15 Sup. Ct. Rep. 194, 199: 'If the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use.' The line between invention and mechanical skill is often an exceedingly difficult one to draw; but in view of the state of the art as heretofore shown, we cannot say that the application of this old device to a use which was only new in the particular machine to which it was applied was anything more than would have been suggested to an intelligent mechanic, who had before him the patents to which we have called attention. While it is entirely true that the fact that this change had not occurred to any mechanic familiar with windmills is evidence of something more than mechanical skill in the person who did discover it, it is probable that no one of these was fully aware of the state of the art and the prior devices; but, as before stated, in determining the question of invention, *we must presume the patentee was fully informed of everything which preceded him whether such were the actual fact or not.* * * *"

The court next proceeds to a consideration of the exact question which we have before us, and as to which counsel for appellees was rash enough or sufficiently uninformed, to state that he did not know the question had been decided in any reported case. We shall quote the court directly, so that no misunderstanding or mis-

construction can occur. We urgently invite Your Honors' attention to the following passage, which, we submit, settles a main question with which this present brief deals (pp. 494-495):

> "3. One of the principal questions pressed upon our attention related to the power of the court of appeals to order the dismissal of the bill before answer filed, or proofs taken, upon appeal from an order granting a temporary injunction.
>
> "This question is not necessarily concluded by Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407, since in that case the interlocutory injunction was granted after answer and replication filed, a full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction and a reference of the case to a master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill.
>
> *"Does this doctrine apply to a case where a temporary injunction is granted pendente lite upon affidavits and immediately upon the filing of a bill?* We are of opinion that this must be determined upon the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possi-

ble, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; *or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why to save a protracted litigation, the court may not order the bill to be dismissed.* Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or if no question be made regarding the identity of the alleged infringing device, *and it appear clear that such device is not an infringement,* and no suggestion be made of further proofs upon the subject, we think the court should not only overrule the order for the injunction, but dismiss the bill. Gardt v. Brown, 113 Ill. 475, 55 Am. Rep. 434. This practice was approved by the Chief Justice in a case where the bill disclosed no ground of equitable cognizance, in Green v. Mills, 25 U. S. App. 383, 69 Fed. Rep. 852, 16 C. C. A. 516, 30 L. R. A. 90, and by the circuit court of appeals for the sixth circuit in Knoxville v. Africa, 47 U. S. App. 74, 246, 77 Fed. Rep. 501, 23 C. C. A. 252, where the question involved was one of law and was fully presented to the court. The power was properly exercised in this case.

"There was no error in the action of the circuit court of appeals, and its decree is affirmed."

The above quoted passage from Mr. Justice Brown's opinion establishes the doctrine that a circuit court of appeals upon appeal to it from the allowance or refusal of an injunction *pendente lite* upon a showing of affidavits, may and should in order to save the expense of protracted litigation, not only reverse the lower court where justified, *but order dismissal of the bill as well.* Dismissal may be predicated upon any one of the four grounds specified in the opinion above:

1. Where the bill is obviously devoid of equity upon its face and incapable of remedy by amendment.

   (Probably does not apply to the instant case.)

2. Where the patent manifestly fails to disclose a patentable novelty in the invention.

   (True of the instant case.)

3. Where the patent is anticipated if nothing exists in the affidavits which tends to throw any doubt upon the existence or date of the anticipating things, and which, given their proper effect, establish invalidity of the patent.

   (True of the instant case.)

4. Where the patent is not infringed in cases where no question arises as to the identity of the alleged infringing device.

   (True of the instant case.)

While we have undertaken to show Your Honors that non-infringement is clearly made out in the case at bar,

and further that the Lunati patent should be declared void because anticipated, we nevertheless particularly stress the fact that the Lunati patent is clearly void for want of patentable invention. Just as the patentee Martin in the Mast-Foos case, supra, was charged with a knowledge of the state of the art when he was said to have created his alleged windmill improvement, so in the instant case Lunati is presumed to have known the state of the elevator and analogous arts when he took therefrom an ordinary elevator of lifting structure or assembly and began to lift automobiles with it. This decidedly is not within the domain of patentable invention, just as in the Mast-Foos case it was held to be no more than an adaptation which any mechanic skilled in the art could have made, *and the fact that none did so before Martin does not change the situation.* On this subject, the following excerpt from the Mast-Foos opinion is controlling (p. 492):

> "* * * This is undoubtedly a different use from that to which the Martin combination was put; but the question is, whether there is not such an analogy between the several uses in which this combination was employed as to remove its adoption, in the use employed by Martin, from the domain of invention."

In fact, the entire Mast-Foos case is so strikingly similar to the case at bar that we will below point out to this court in parallel columns the significant similarities:

Mast, Foos & Co. v. Stover Mfg. Co.	*Rotary Lift et al. v. Sommer*
Patent infringement suit	Same
Motion for preliminary injunction upon the pleadings and affidavits	Same
One prior adjudication holding patent valid and infringed in other circuit by the circuit court of appeals thereof.	Same (except that the prior adjudication is not from a circuit court of appeals)
Lower court followed prior adjudication notwithstanding new defenses and prior art set up in case before it.	Same
Patent for old assembly put to new and analogous use	Same (only Lunati followed earlier automobile lifts such as Zimmerman patent)
Preliminary injunction ordered	Same
Appeal taken from order granting preliminary injunction	Same
Record consists of pleadings, *ex parte* affidavits, etc.	Same

Appellant urged appellate court to review case on its merits and particularly determine the issues of infringement and validity.	Same
Appellate court found the patent void for want of invention, reversed the order for a preliminary injunction *and ordered the bill dismissed.*	Appellant urges same ruling.
Upon *certiorari* to Supreme Court, the Circuit Court of Appeals decree affirmed.	If *certiorari* in this case after dismissal, then most certainly same result would under this case follow.

Also, appellant's answer was in before injunction ordered.

We, therefore, submit, in concluding our discussion of the Mast-Foos case, that it constitutes a direct, positive and complete precedent for Your Honors in deciding this case according to appellant's contention. No further search need be made for other authorities, although, as we shall hereinafter point out, the doctrine of the Mast-Foos case has been recognized and applied by this honorable court, and as well by the appellate tribunals of many of the other circuits. No extended discussion of those cases is needed, nor would be proper in view of the sweeping opinion in the Mast-Foos leading case, and we shall, therefore, do little more than to cite the cases which uphold the doctrine in question.

Additional Cases Recognizing the Mast, Foos Case Doctrine.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810.

While the above case, previously arising on *certiorari,* did not apparently involve a preliminary injunction on affidavits, the said appeal having been taken from an interlocutory decree granting an injunction and ordering an accounting for profits and damages, nevertheless the Supreme Court did definitely decide that in such a case a Circuit Court of Appeals was warranted, in order to avoid protracted and unnecessary litigation, in considering the case fully on its merits and not only as to the injunction feature of the case and as to which the appeal solely pertained. This court refused to grant a motion brought by plaintiff-appellee to dismiss the appeal so far as it involved any question except whether an injunction should be awarded, and instead this court proceeded with a review of the question of validity and infringement, decided them in favor of the defendant and entered a decree reversing the decree of the lower court in one of the cases constituting the appeal, and in the other and after a rehearing, not only reversed the lower court but ordered the bill to be dismissed. *Certiorari* was denied by Mr. Justice Gray, speaking for the court, and full power was accorded a Circuit Court of Appeals in considering the questions of validity and infringement upon such an appeal. The court said (p. 525):

> "In each of the cases now before the court, therefore, the circuit court of appeals, upon appeal from the interlocutory decree of the circuit court, grant-

ing an injunction and ordering an account, had authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill."

The above opinion undoubtedly constituted the foundation for the later Mast-Foos, *supra,* decision, and is referred to by us for that particular reason.

(Ninth Circuit Cases.)

Rip Van Winkle Wall Bed Co. v. Murphy Wall Bed Co., 1 Fed. (2) 673 (referred to in our opening brief).

The appeal in the above case was heard by Circuit Judges Gilbert, Hunt and Morrow, the last named writing the opinion. Appeal was prosecuted by defendant therein from the grant of a preliminary injunction *pendente lite* by the District Court of the Northern District of California, Third Division, in a suit for infringement of letters patent. This court took the decided view, and over the strenuously urged objections of plaintiff-appellee, that the entire case was before it for determination, and this court thereupon considered the question of infringement, the validity of the patent being incontested, found that the defendant's device was not within the scope of plaintiff's patent and, therefore, did not infringe, and then reversed the order of the District Court granting the injunction, *and ordered that the bill be dismissed.* It must be remembered that in this case plaintiff's motion for preliminary injunction was decided upon *ex parte* affidavits of the respective parties, just as in the case at bar. And, just as in the instant case, the record was complete enough to warrant and enable the appellate

court to consider the case on its merits. We quote from the able opinion of Judge Morrow (p. 675):

> "That rule is, however, subject to the qualification that where the order for the injunction *pendente lite* is entered by the District Court upon a full hearing of the case upon the merits, and the appeal brings up the entire case for determination, the order for the injunction will be reviewed and determined accordingly. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 545, 558, 19 C. C. A. 25.
>
> "The District judge, in his opinion in the present case, granting the injunction *pendente lite,* said:
>
> " 'The matter has been as fully presented (with full sets of models) upon this motion as it could be upon final hearing. The affidavits, briefs, and oral arguments, have, indeed, been models of ability and exhaustive in scope.'
>
> "The record before us on appeal is in accordance with the statement of the District Judge and the assignments of error bring up the whole case, presenting the single question of infringement."

In finding non-infringement, Judge Morrow made some observations which are such good law and so strictly applicable and pertinent to the case at bar, on the issue of infringement, that we beg the indulgence of Your Honors in quoting same *in toto* (p. 679):

> " 'The public is notified and informed by the most solemn act on the part of the patentee, that his claim to invention is for such and such an element or combination, and for nothing more. Of course, what is not claimed is public property. The presumption

is, and such is generally the fact, that what is not claimed was not invented by the patentee, but was known and used before he made his invention. But, whether so or not, his own act has made it public property if it was not so before. The patent itself, as soon as it is issued, is the evidence of this.'

"This rule of law is as applicable to the 'broad idea,' if such there is, as it is to the essential elements of the patent.

"In McClain v. Ortmayer, 141 U. S. 419, 423, 12 Sup. Ct. 76, 77 (35 L. Ed. 800), Mr. Justice Brown, delivering the opinion of the Supreme Court, said:

" 'Nothing is better settled in the law of patents than that the patentee may claim the whole or only a part of his invention, and that if he only describe and claim a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to "particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery," is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.'

"The 'broad idea' of an opening in the wall wider than the bed, or a lateral shifting of the bed with respect to such opening, has not been claimed by the plaintiff in his patent, and the patent cannot, therefore, be expanded to include either of such elements."

And then Judge Morrow observes what is exactly true in the instant case and which, we submit, releases Mr.

Sommer's hoist from any possible construction contemplated by the claims of the Lunati patent in suit. The essential differences between the Lunati patent structure and the defendant-appellant's hoist become even more essential and important and controlling because of the admitted narrow scope of the said Lunati patent even if valid (p. 679):

> " 'Where a patent depends for its novelty over the prior art upon a single limited feature of construction, the claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature.' "

And so, were the Lunati patent valid, it could not be infringed by appellant.

> *Arizona Edison Co. v. Southern Sierras Power Co.,* 17 Fed. (2d) 739.

While the above is not a patent case, it does involve an appeal from an order of the lower court refusing to dissolve an injunction, and the principle is the same. We quote directly from Judge Gilbert's opinion (p. 740):

> "The scope of the inquiry on the appeal *is not confined to the question of the exercise of the trial court's discretion,* which is usually decisive on appeals from orders granting or refusing to dissolve interlocutory injunctions. In a case such as we find this to be, an appellate court may properly go farther and consider whether or not the case made by the bill of complaint is of the class of cases in which injunctive relief may be granted; for it is well-settled that, where there is an insuperable objection to the bill, either as to jurisdiction or merits, an appellate court may enter a final decree directing its

dismissal. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 495, 20 S. Ct. 708, 44 L. Ed. 856; Harriman v. Northern Securities Co., 197 U. S. 244, 287, 25 S. Ct. 493, 49 L. Ed. 739; U. S. Fidelity Co. v. Bray, 225 U. S. 205, 214, 32 S. Ct. 620, 56 L. Ed. 1055; Denver v. New York Trust Co., 229 U. S. 123, 136, 33 S. Ct. 657, 57 L. Ed. 1101."

(Cases From Other Than the Ninth Circuit.)

Pelton v. Williams, 235 Fed. 131 (C. C. A., 6th).

The above was an appeal to the Circuit Court of Appeals for the Sixth Circuit from an order granting a preliminary injunction in a suit for infringement of patent. The court, *per curiam,* recognized its full authority to consider the case on the issues of validity and infringement, but found it unnecessary to review the patent as to validity in view of obvious non-infringement. The court said (p. 132):

> "This is an appeal from an order granting a preliminary injunction against appellant for alleged infringement of letters patent No. 873,399, issued December 10, 1907, to appellee. The pleadings, so far as reference to them is necessary, are in the usual form for presenting issues of infringement and validity of the patent in suit. We do not find it necessary to pass upon the validity of the Williams' patent; for we are convinced that the infringement alleged cannot be sustained. * * *"

The court then proceeded to hold the patent there in suit limited and particularly on the file wrapper in view of certain rejected and abandoned claims, and in dis-

posing of the case and in ordering the bill dismissed, said (p. 134):

> "It results that the order of injunction must be reversed and the cause remanded, with instruction to enter an order directing the clerk of the court below to return all moneys received by him from appellant in pursuance of the injunction order mentioned, and also dismissing the bill, with costs. Smith v. Vulcan Iron Works, 165 U. S. 518, 525, 17 Sup. Ct. 407, 41 L. Ed. 810; Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 495, 20 Sup. Ct. 708, 44 L. Ed. 856."

Victor Talking Mach. Co. v. Starr Piano Co., 263 Fed. 82 (C. C. A., 2nd).

The above was an appeal by plaintiff in a patent infringement suit from the refusal of the lower court to grant a preliminary injunction upon motion made therefor. While Circuit Judge Manton did not order a dismissal because of certain peculiar factors in the case, he did recognize the Mast-Foos doctrine as giving him full power to do so in an appropriate case. We quote his words (p. 84):

> "* * * But the right of the court to be at liberty to re-examine the former adjudication, and dispose of the question in accordance with its own convictions, should never be denied. Curtis v. Overman Wheel Co., 58 Fed. 784, 7 C. C. A. 493 (Second Circuit, C. C. A.). It is also true that this appellate court, on an appeal from an order granting or denying an injunction, may decide the case upon the merits, and direct a dismissal of the suit, if it is of the opinion that the plaintiff was not entitled to an

injunction because his bill had no equity to support it. Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. This court is not confined in its review of the injunction order to the justice of the denial of the temporary injunction, but it may consider the sufficiency of the defense interposed. Linde Air Products Co. v. Morse Dry Dock Co., 246 Fed. 834, 159 C. C. A. 136.

"The Supreme Court has held that where a bill is devoid of equity, and it so appears upon its face, *or if the patent manifestly fails to disclose patentable novelty in the invention,* a protracted litigation may be avoided, and the appellate court may dismiss the bill. Mast, Foos & Co. v. Stover Co., 177 U. S. 495, 20 Sup. Ct. 708, 44 L. Ed. 856."

The following cases are submitted with only necessary brief comment as examples of the recognition by courts of the various circuits, and by the Supreme Court, accorded the Mast-Foos doctrine upon appeals from preliminary injunctions:

Becher v. Contoure Laboratories, Inc., 29 Fed. (2d) 31 (C. C. A., 2nd);

Frye-Bruhn Co. v. Meyer, 121 Fed. 533 (C. C. A., 9th);

Brill v. Peckham Motor Truck & Wheel Co., 189 U. S. 57, 47 L. Ed. 706.

The Supreme Court in the above case sent the case back for further proofs, apparently because of the peculiar situation involved, and especially for the reason that the record indicated plaintiffs had no opportunity

before hearing to inspect the *ex parte* affidavits filed by defendants and were granted no leave to rebut them.

Co-operating Merchants' Co. v. Hallock et al., 128 Fed. 596 (C. C. A. 6th);

Denaro v. McLaren Products Co., et al., 9 Fed. (2d) 328 (C. C. A., 1st);

U. S. Fidelity & Guaranty Co. v. Bray, et al., 225 U. S. 204, 66 L. Ed. 1055 (not a patent case, but rule recognized);

Meccano, Ltd., v. Wanamaker, 253 U. S. 136, 40 Sup. Ct. 463.

In the above case Mr. Justice McReynolds said (p. 465 of 40 Sup. Ct. Rep.):

"* * * The power of Circuit Courts of Appeal to review preliminary orders granting injunctions arises from section 129, Judicial Code, which has been often considered. Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810; Mast, Foos & Co. v. Stover Manufacturing Co., 177 U. S. 485, 494, 20 Sup. Ct. 708, 44 L. Ed. 856; Harriman v. Northern Securities Co., *supra*; United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 214, 32 Sup. Ct. 620, 56 L. Ed. 1055; Denver v. New York Trust Co., *supra*. *This power is not limited to mere consideration of, and action upon, the order appealed from; but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated.*"

Dupont v. Dennison Mfg. Co., 18 Fed. (2d) 317 (D. C. N. D. Ill. E. D.).

In the case above, which is not an appeal, District Judge Carpenter followed the drastic but fully warranted

procedure of dismissing the case on motion for preliminary injunction based on a showing of *ex parte* affidavits, because the patent was void on its face for want of invention. The case arose on plaintiff's motion for a preliminary injunction, and as to which defendant moved to dismiss the bill on several grounds, including the ground that the patent was void on its face for lack of patentable novelty and invention, and on which issue the Court determined the entire case, found the patent invalid for want of invention, and in order to save a protracted litigation, quoting from the Mast-Foos case, *supra,* dismissed the bill of complaint at plaintiff's cost.

In conclusion on this point we will quote from the most recognized text authority, *Walker on Patents,* Sixth Edition (Sec. 736, p. 817):

> "The Circuit Court of Appeals, on an appeal from an order granting a preliminary injunction, may not only reverse that order, but may also direct the court below to dismiss the bill of complaint. * * *" (Citing authorities all considered herein.)

Lunati is not in any sense of the word an inventor. We submit that what he did any skilled mechanic, confronted with the same problem, could have done without even the exercise of a moderate amount of ingenuity. Lunati's alleged contribution was to take the old style hydraulic elevator, the purpose of which was to lift and lower objects, and what the objects were is immaterial, and then by eliminating the cage or platform of that elevator, to make the under-structure of an automobile or other vehicle accessible. Even this had been done as in the Zimmerman patent.

Walker on Patents, Sixth Edition, Section 59, page 67, says:

> "The United States Circuit Court of Appeals, Third Circuit, in Pyrene Mfg. Co. v. Boyce et al., 292 F. R. 480, 481, stated:
>
> " 'On the major issue of validity we shall first inquire whether the conception for which the patent was granted involves invention. Because of the lack of definite rule, questions of this kind are often perplexing. It is a trite saying that invention defies definition. Yet through long use, the word has acquired certain characteristics which at least give direction to its meaning. Invention is a concept; a thing evolved from the mind. It is not a revelation of something which exists and was unknown, but is the creation of something which did not exist before, possessing the elements of novelty and utility in kind and measure different and greater than what the art might expect from its skilled workers.'
>
> "To be a patentable invention there must be present a creative mental conception as distinguished from the ordinary faculties of reasoning upon materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice by those skilled in the art." (Citing cases.)

A mere "idea" is unpatentable.

And following, in Section 60, *Walker* says (pp. 67-68):

> "It has been shown that the word 'discovered,' in Section 4886 of the Revised Statutes, has the meaning of the word 'invented.' It follows that patents are grantable for things invented, and not for things otherwise produced, even where the production re-

quired ability of a high order. Novelty and utility must indeed characterize the subject of a patent, but they alone are not enough to make anything patentable; for the statute provides that things to be patented must be invented things, as well as new and useful things. * * *"

Surely seeing an elevator lift something, and then throwing in some details, which Attorney Williams admitted on argument, could not require the exercise of invention, cannot constitute a patentable invention.

In *Ray v. Bunting Iron Works,* 4 Fed. (2d) 214. this court said:

"'The result of the application of the common skill and experience of a mechanic, which comes from the habitual and intelligent practice of his calling, to the correction of some slight defect in a machine or combination, or to a new arrangement or grouping of its parts, tending to make it more effective for the accomplishment of the object for which it was designed, not involving a substantial discovery, nor constituting an addition to our knowledge of the art, is not within the protection of the patent laws.' Sloan Filter Co. v. Portland Gold Min. Co., 139 F. 23, 71 C. C. A. 460, and cases there cited.

"Nor is there anything new or novel in the combination aside from mere mechanical changes, or changes in machine design. Thus we find the same combination of atomizer and fan in the Mack patent, No. 548,647, issued October 29, 1895, and to some extent in the Klein patent, No. 473,759, issued April 26, 1892. The cases are uniform in holding that there is no invention in merely selecting and fitting together the most desirable parts of different machines in the same art, if each operates the

same in the new machine as it did in the old and effects the same result.

"'It is said that appellee's carrier is not anticipated by any single patent; but it is not necessary to show complete anticipation in a single patent. The selection and putting together of the most desirable parts of different machines in the same or kindred art, making a new machine, but in which each part operates in the same way as it operated before and effects the same result, cannot be invention; such combinations are in the nature of things the evolutions of the mechanic's aptitude rather than the creations of the inventor's faculty.' Huebner-Toledo Breweries Co. v. Mathews Gravity Carrier Co., 253 F. 435, 447, 165 C. C. A. 177, 189."

See further:

Keene v. New Idea Spreader Co., 231 Fed. 701, 709 (C. C. A. 6th Cir.);

Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 223, 37 L. ed. 707, 710;

Sloan Filter Co. v. Portland Gold Mining Co., 139 Fed. 23 (C. C. A. 8th Cir.);

Greist Mfg. Co. v. Parsons, 125 Fed. 116, (C. C. A. 7th Cir.).

Specific Examples of Misrepresentation in Appellees' Brief and on Argument.

We beg leave to tersely and briefly point out the following marked misrepresentations of appellees by brief and argument, which should not be overlooked in determination of the issues before this court.

Appellees' counsel has never defined the alleged invention of the Lunati patent except to talk vaguely about

putting two *rails* on a single plunger. Of course, there could be no invention over the prior art in putting rails on an hydraulic piston or plunger. Sommer uses no such "rails," that is, the rails of the Lunati patent shown clearly in the prior art in Zimmerman, and upon which the wheels of the automobile are to be rolled. These are the only rails, or else why the wheel chocks on the end? Why any small excavation for a stuffing box unless the rails go down to the earth level? They do not need to go down to that level in appellant's use, where the beams come up under the axles.

In fact, the elevator publication, page 6, Vol. 3 of transcript of record, Book of Exhibits, clearly shows beams on top of an elevator plunger or piston (B) upon which an automobile or any other load may be lifted, between which beams (B) the under-body of the automobile can be serviced. *Preventing* accessibility is a deliberate mechanical act; *permitting* accessibility is a natural condition of parts. No platform is shown in Fig. 3 on this page. Neither the addition of a stop to a plunger nor permitting it to normally rotate, nor permitting accessibility to the plunger load, nor providing a hole in the ground for a packing, could import any possible invention to any such elevator structure, and appellees' counsel has admitted that these things are simply the provisions of an ordinary and not an exceptional mechanic.

As to the Wood patent (Book of Exhibits, p. 201), in spite of attempted distortion of its disclosure, the latter clearly contains a single piston or plunger, in a cylinder, the plunger being rotatable and having a stop, and there being a packing gland around the plunger, and rails being

supported on the plunger. The entire weight of a load can be supported upon the plunger. The Wood plunger moves vertically in either direction. If one small enough to service an automobile were made, all appellees' contentions would fall. The automobile would be lifted—not lowered. No counterweights would be necessary. Putting Zimmerman's two rails on Wood's single piston, which any ordinary mechanic would do without inspiration, gives us what Lunati discloses. There is no possible answer to this statement. It has been in substance admitted.

In addition to the many respects in which appellant's elevator structure does not infringe, it may be pointed out further that the plunger does not fit the cylinder at any zone. Two cast guide rings are fastened inside the cylinder with a working fit for the plunger which they surround and guide. One is near the upper end of the cylinder, the other two feet or so below it. No cylinder packing end is provided, but a packing gland which fits around the plunger is drawn into the top end of the cylinder by bolts passing through it and screwing into nuts welded to the top of the cylinder. This packing is compressed around the plunger between the gland and the upper ring. No excavation for the packing gland is required because it has a smaller diameter than the cylinder. The bars or beams in appellant's device are not parallel, and wheels could not be supported or rolled upon them. They are bent inwardly to the plunger head instead of being straight and supported as in the Lunati patent. Of course, no fluid is forced into and out of the appellant's cylinder. In a novel way his hollow plunger is formed to serve as a fluid chamber in which

compressed air regulates its use. The open bottomed plunger of the Lunati patent *could not be so used.* Appellant does not need to use a recess in the ground to accommodate his packing as he places the packing inside a cylinder. However, such a hole in the ground could import no novelty or invention. Such an arrangement and the stop for the plunger are both old in the prior art as previously pointed out.

Turning to general aspects of misrepresentation in appellees' brief, the actual conditions obtaining are not properly pointed out on page 12. We submit that partner Hinkle's arguments on the merits of a preliminary injunction motion were no worse in substance than those of Attorney Williams, and obviously Attorney Hinkle could have tried the case. It is foolish for appellees to contend that a patent lawyer, constantly practicing his profession for years, and having a coterie of partners, could not try this case as well as any other, or, if not, that one of his partners could not have done so, with eleven whole months after the bringing of the suit within which to prepare. Clearly all that appellees wanted was a preliminary injunction, to choke off the sources of income of appellant so that he could not support the defense of the case by trial.

On page 19 is an unwarranted implication that appellant's counsel had some *"ex parte"* discussion with the court regarding the reference. The reference had been asked in open court again and again, and only the matter of Mr. Lyndon's affidavit, as usable on reference, was referred to in this episode—a mere trivial and incidental matter. We bitterly complain in this case of the repeated

yond the merest and sheerest mechanical skill, particularly over the prior art. We quote as follows (p. 87):

> "* * * Never before had parallel vehicle supporting rails been carried and elevated by a single centrally disposed hydraulic plunger to afford access to an automobile underbody. Never before had a single rotatable and vertically movable plunger carried parallel vehicle supporting rails which it could elevate to afford access to the underbody of an automobile."

On page 109, appellees refer to *Angelus v. Wilson,* a decision of this court, in which present counsel for appellant represented the successful appellees. This case is not in point at all. There there was a broad new underlying combination, and former Judge Hunt so held.

A piece of arrant sophistry occurs at the bottom of page 124. No *ex parte* suggestions of reference were made by appellant's counsel, and there is no such record or foundation for any such untrue statement. Judge Hollzer decided upon this reference after repeated suggestions of it with both counsel present, not only in open court but in chambers.

Inspection of the various charts and inserts in appellees' brief should be very carefully made. The showing therein contained is a strange showing as to comparison and contrast, and the record may far better be resorted to. Such arbitrary *ex parte* tabulated conclusions are not evidence and are not dependable.

CONCLUSION.

In fine, the history of the Lunati patent is of that kind which warrants this court in casting the trade and industry loose from the shackles of an improper and improvidently granted patent monopoly. It is the duty of the Federal courts to protect the rights of workers in the arts as much as to protect the rights of inventors in the art. Lunati was no inventor. By a process of harassing workers in the art and forcing them to their knees in exacting consent decrees, and as a result of a most unwise decision in the Western District of Tennessee, where the court obviously had not made its mind up conclusively, the Lunati patent has been used to suppress fair and honest competition.

Not only did appellant never have a real chance in the lower court, what with delays, interference with due course of procedure by opposing counsel, and making and unmaking of an order of reference and the like, so that he never was given his real day in court on trial, *but* we assert that the result of any such a trial could not be more certain than is the propriety, on the face of the record now before Your Honors, of finding the patent void for want of invention. Neither can appellant infringe. We, therefore, ask that the order be reversed and the lower court ordered to dismiss the bill, both for non-invention and non-infringement. The preliminary injunction order was the direct result of bias, prejudice and abuse of discretion, coupled with disregard of the facts and law, and it ran against all the equities.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,

KELLY L. TAULBEE,

Solicitors and Counsel for Appellant.

No. 6847.

IN THE

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Herman C. Sommer,
Defendant-Appellant,
vs.
Rotary Lift Company and Peter J. Lunati,
Plaintiffs-Appellees.

Petition in the Nature of a Petition for Rehearing to Amend Opinion of This Court Dated September 6, 1933.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 6847.

IN THE

United States
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FOR THE NINTH CIRCUIT.

Herman C. Sommer,
Defendant-Appellant,
vs.
Rotary Lift Company and Peter J. Lunati,
Plaintiffs-Appellees.

Petition in the Nature of a Petition for Rehearing to Amend Opinion of This Court Dated September 6, 1933.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes your petitioner, Herman C. Sommer, defendant-appellant herein, by and through his solicitors and counsel of record, and respectfully represents that certain and various discrepancies seem to exist as between the printed opinion of this Honorable Court, dated September 6, 1933, and the matters of record in this cause. Believing that such discrepancies are the result either of clerical mistakes or of inadvertent oversight, petitioner believes it his duty to point out such discrepancies and inaccuracies

so that, in Your Honors' discretion, said opinion may be amended and corrected to conform with the record facts herein, prior to the printing thereof in the law reports, and to that end petitioner suggests and requests a withholding of the said opinion from print until this, his petition, shall have been passed upon by Your Honors.

As grounds for this petition, your petitioner respectfully shows to Your Honors the following discrepancies and, as petitioner views it, inaccuracies appearing in the said opinion of September 6, 1933:

(1) Page 1, line 2: "appellant" should be "appellee."

(2) Page 2, paragraph 2, lines 1-2: The "appeal" denied by the trial court was an appeal *with supersedeas,* which was thereafter so allowed by His Honor, Judge Wilbur.

(3) Page 2, paragraph 2, lines 2-3: The record on appeal herein not only consists of the two volumes indicated, but also of a third volume, comprising some 321 pages of exhibits entitled "Volume 3, Book of Exhibits Accompanying Transcript of Record."

(4) Page 2, paragraph 2, lines 4-6: No effort, after due consideration thereof, was made to comply with Rule No. 75, sub. b, because of the fact that this is an appeal from the allowance of plaintiffs' Motion for a Preliminary Injunction presented and considered by the Court on various fact and expert affidavits, pleadings, patents, blue prints, etc. No testimony in question and answer form was adduced and, therefore, it was the conclusion of petitioner that no "evidence" existed in the case as to which Equity Rule 75, sub. b, could apply. It was for that reason that no "statement" on appeal was prepared, the por-

tions of the record to be printed or to go up as exhibits being indicated simply by praecipe of the respective parties in compliance with sub. a of said Equity Rule 75. The affidavits, of course, being already in narrative form, could not, in the opinion of petitioner, be further narrated or condensed, and, furthermore, Equity Rule 75 excludes the condensation of all "expert testimony." It has been the customary practice on appeals in this Circuit, as far as petitioner is informed and his counsel are experienced, to prepare and file a statement of the evidence which is in reality a narrative condensed statement of the oral testimony, in all cases in which decrees have been rendered after final hearing thereof on the merits. Nevertheless, on appeals from the allowance of preliminary injunctions presented only on affidavits and showings without "testimony," petitioner is not aware of any prior practice in this or any other Circuit which requires the preparation of a statement on appeal such as is contemplated by sub. b of Equity Rule 75. In other words, that provision of the rule applies only, in the humble opinion of your petitioner, to appeals from decrees rendered after a hearing on the merits in cases wherein oral testimony has been adduced, and does not apply to appeals from the grant of motions for preliminary injunction presented and heard primarily on affidavits filed by the respective parties. If, as to such matters of procedure, petitioner's counsel are in error or Your Honors deem it proper to lay down a different interpretation of Rule 75, petitioner and his counsel will welcome further enlightenment.

Notwithstanding the above recited observation, petitioner *has* prepared and lodged under date of September 27, 1933, with the clerk of the District Court for the

Southern District of California, Central Division, an attempted condensed statement on appeal, and has given notice to solicitors and counsel for appellees herein of such lodgment and of petitioner's intention to present same to the trial court for settlement on a day certain, all in earnest endeavor to comply with Your Honors' said opinion, and order to that effect, both of September 6, 1933.

(5) Page 2, paragraph 2, *et seq.*: Reference is made to a certain order of the trial judge in this cause, whereby there was required the printing of the reporter's transcript of arguments on various motions presented to the trial judge and including plaintiffs' motion for preliminary injunction herein. Petitioner had specified in his praecipe such transcript to be transmitted to this Honorable Court as a physical exhibit, and it was due to appellees' insistence that same be printed that such an order was made by the lower court. Thereafter, feeling himself aggrieved by such order of the District Judge, petitioner presented to Your Honors, for a ruling thereon, the matter of printing said reporter's transcript, and in support of his contention that such reporter's transcript should not be included in the printed record on appeal, filed with the clerk of this Honorable Court a memorandum or brief in which petitioner, among other things, said:

> (Brief, p. 2) "Defendant-appellant complains of the ruling of Judge Hollzer in one respect, namely, in sustaining plaintiffs-appellees' objection to sending up as physical exhibit the reporter's transcript of arguments on various motions considered and ruled upon by the District Court, although the privilege is granted the appellant in said order to include such matters as a part of his printed record.

"Defendant'appellant originally designated, on page 4, lines 26 to 28 of his praecipe, the provision that such transcript be sent up as a physical exhibit. Practically every argument in this case before the District Court, beginning with defendant's motion to dismiss the complaint, and proceeding through various and many discovery matters down to and including plaintiff's motion for preliminary injunction, and thereafter various matters in respect to taking an appeal, were reported by the official court stenographers.

(Brief, p. 3) "Defendant-appellant realizes that ordinarily a transcript of mere arguments on various preliminary motions, or even on the motion for preliminary injunction which is appealed from, should possibly not be sent to the Circuit Court of Appeals, but in the case at bar such arguments are believed material and relevant in view of the sweeping and serious charges of error assigned by defendant-appellant. It is believed, and it is our contention, that such arguments contain many important, controlling and significant admissions and concessions on the part of plaintiffs-appellees and explanations of said parties' position in respect to many of the issues of the instant cause made through or by their counsel in open court, and contain also many observations of the District Court in respect to such issues, a great deal of which does not and will not appear of record except by and through the said reporters' transcripts of such arguments. Defendant-appellant takes the position that such matters are of vital importance to his appeal, and he also expects to refer in his briefs to various of such matters, and in order to justify

this expected practice, it will be necessary that the said transcripts are available to Your Honors, which can readily and conveniently be accomplished by sending up said transcripts as physical exhibits. But in no case is it necessary or proper that such things be printed **in extenso* as a part of appellant's record, and such things are, of course, not evidence such as can or should be condensed under Equity Rule 75. Furthermore, there is no warrant for printing arguments under Equity Rule 75, and we know of no authority in this circuit for such a practice. Defendant-appellant desires to avoid the heavy, and in our humble opinion, the totally unnecessary expense incident to printing such matters, by sending them up as physical exhibits. *We believe that Your Honors will not sanction the padding of appellant's printed record with hundreds of pages of arguments in the lower court.* The arguments alone of November 9th, 16th, 30th and December 1st, of the year 1931, comprise some 302 pages, and many other matters were reported long before, and we believe subsequent, to those dates.

(Brief, p. 4)

"Plaintiffs' counsel, Lynn A. Williams, Esq., in his memorandum brief filed with Judge Hollzer on this matter, states that plaintiffs-appellees have no objection to the inclusion of these transcripts as a part of the appeal record, but insist that such transcripts be printed. Apparently the only reason advanced it (quoting from his said memorandum brief): 'It is our belief also that physical exhibits rarely come to the attention of the judges of an appellate court in any very effective manner.' We do not agree with Mr. Williams' comment, nor do we believe

(Brief, p. 5) that such, is a fact. For that matter, *we feel convinced that all exhibits of any and every character and description invariably are accorded complete, careful and conscientious scrutiny by the Honorable Judges of this Ninth Circuit.

"In conclusion, defendant-appellant wishes to avoid the unnecessary and heavy and unreasonable expense incident to printing hundreds of pages of arguments before the District Court. Defendant-appellant also believes, and takes the position, that Your Honors will be concerned with diminishing the printed record on this appeal as much as is practicable. Appellant also believes that the said transcripts can go up as physical exhibits, accomplish the purposes for which appellant contends, and also meet the full requirements of Your Honors in the most convenient and sensible manner. While we wish to avoid any charge that plaintiffs-appellees or their counsel are endeavoring to inflict on defendant-appellant an unreasonable financial burden, still in view of the insistence that such transcripts of arguments be included in the printed record, such conclusion and charge is perhaps unescapable.

"In presenting this matter in this form to Your Honors, it is the aim and hope of defendant-appellant to expedite the perfecting of his appeal and to determine exactly what shall be included in

(Brief, p. 6) his printed *record and exactly what things shall go up as physical exhibits, and at the same time abide by proper practices and precedents relating to such matters and to accomplish all this at a minimum amount of expense to appellant, already financially burdened to the full extent of his capacity."

Thereafter, and following oral opposition in open court, although no reference is made to said motion and the order thereon in Your Honors' said opinion of September 6, 1933, such order issued from this Honorable Court, dated August 15, 1932, and which said order, according to the copy thereof received from the clerk by solicitors and counsel for petitioner, was worded as follows:

(Caption omitted.)

"Order Denying Motion of Appellant That Reporter's Transcript of Arguments Be Sent to Court of Appeals as Physical Exhibits.

"Upon consideration of the appellant's motion that reporters' transcript of arguments be sent to this court as physical exhibits instead of being included in the printed transcript of record, and of the appellant's memorandum thereon, filed on July 8, 1932, and of the objection to said motion urged in open court on July 19, 1932, by Mr. A. C. Aurich, counsel for appellees herein, and good cause therefore appearing,

"It Is Ordered that said motion that reporters' transcript of arguments be sent to this court as physical exhibits instead of being included in the printed transcript of record, be, and hereby is denied."

(6) Page 3: Reference is again made to petitioner's failure to prepare a statement on appeal pursuant to Equity Rule 75 and to lodge same in the clerk's office. Explanation of this point has been made herein as aforesaid.

(7) Page 3: Reference is made to the inclusion of petitioner's brief in the printed transcript of record on appeal. Petitioner respectfully points out that a motion

was brought in this court by petitioner to transmit said brief, as well as a number of other documents and papers, all of which petitioner believed should be omitted from the printed record, as physical exhibits to this Court. Said motion was dated as of August 17, 1932, and fully explained the nature of such documents and papers as therein referred to and petitioner's reasons for wishing to omit same from the printed record. Specifically, petitioner prayed for an order from this Honorable Court to the effect that the following things then specified to be printed in a Book of Exhibits herein, be transmitted instead as physical exhibits to this Court:

> "1. Defendant's Memorandum of Points and Authorities Opposing Plaintiffs' Motion for a Preliminary Injunction." (The "brief" referred to by Your Honors.)
>
> "2. Plaintiffs' Exhibits 23 and 24 referred to in the O'Brien affidavit."
>
> "3. Defendant's Exhibits 1-A to 8-A, both inclusive, with the Lyndon affidavit."
>
> "4. Decree and answer in the Joyce-Gridland cause."
>
> "5. Answer, Report of Standing Master, and Memorandum-Opinion in the Orgill cause."
>
> "6. Plaintiffs' Exhibits 25 and 26, being respectively a typewritten license agreement and printed sub-license agreement."
>
> "7. Affidavit of Charles M. Fryer and Points and Authorities in support of plaintiffs' motion to vacate the portion of Circuit Court of Appeals' order allowing appeal which refers to supersedeas." (Another brief, occupying pages 983-1008, transcript of record herein.)

As an added convenience to this Honorable Court, and more clearly to point out the exact nature of the things referred to in the motion aforesaid, petitioner transmitted to the clerk of this court copies of said things quoted above and referred to in said motion so that their value to and position on this appeal could more conveniently be determined, and again pointed out and took the position (page 4 of said motion) that:

> "* * * Your Honors will be concerned with diminishing the bulk of the book of exhibits and the printed record on this appeal as much as is practicable and consistent with the rules and practices of this Honorable Court."

Appellees opposed said above referred to motion of your petitioner, and A. C. Aurich, Esq., one of counsel for appellees, appeared in oral opposition to same before Your Honors, as he had done on said preceding motion. Thereafter this Honorable Court entered an order likewise denying the said motion of petitioner to send up such matters as physical exhibits. Said order was dated as of August 25, 1932, and is printed at pages 1009-1010 of Vol. 2, Transcript of Record filed herein.

(8) Last six lines of page 3: Reference is made to the Lamar Lyndon affidavit and the fact that the only thing indicating that such affidavit was used on the application for the preliminary injunction is the statement in the transcript "Affidavit of Lamar Lyndon in opposition to plaintiffs' showing on preliminary injunction order." It is respectfully pointed out that this said affidavit of Lamar Lyndon was filed as a part of the "Showing of Defendant in Opposition to Motion for Preliminary In-

junction, Under Rule to Show Cause" appearing in Vol. 1 of the Transcript of Record on file herein, at page 56 *et seq.* Reference is made therein at page 57 to the Lamar Lyndon affidavit as follows:

> "IV
>
> Affidavit of Lamar Lyndon, expert, and papers and exhibits referred to therein and annexed thereto."

Thereafter, and in its chronological order in the record, being preceded by other affidavits appearing in defendant's said showing, the said Lamar Lyndon affidavit was printed *in haec verba* in Vol. 1, Transcript of Record, at page 340 *et seq.* thereof. Furthermore, the first page index to Vol. 1 of Transcript of Record herein refers to the said Lamar Lyndon affidavit as follows:

> "Affidavit of Lamar Lyndon in Opposition to Plaintiffs' Showing on Preliminary Injunction Order. This Paper is Part of a Motion for Preliminary Injunction. See Page 56 of This Transcript.....340."

The clerk's certificate, Vol. 2, Transcript of Record, pp. 1058-1062, indicates that the entire said "Showing of Defendant," etc., and of which the Lamar Lyndon affidavit was a part as aforesaid, is a part of the said Transcript of Record, and it was certified to as follows:

> (Tr. 1058) "* * * showing of defendant in opposition to motion for preliminary injunction; * * *"

(9) Page 4, paragraph 2: Reference is made again to the great amount of material incorporated in the record herein, which is stated to be entirely irrelevant to the questions arising on this appeal. As before pointed out herein, petitioner consistently resisted the incorporation

in the Transcript of Record of numerous papers and documents and transcripts of argument which were eventually printed as a part of the record under direct order of the lower court and under the two orders of this Honorable Court, all as aforesaid.

(10) Page 4, paragraph 3: As hereinabove pointed out, petitioner has already prepared and has lodged under date of September 27, 1933, a condensed statement on appeal in attempted compliance with the provisions of Your Honors' said opinion and order based thereon. Petitioner will make every effort further to comply with the directions thereof and with any further orders which may issue from this Honorable Court in the premises.

This petition is filed after several communications with the clerk of this court, as a result of which petitioner's counsel concluded that procedure, by way of such petition, was appropriate, and we trust that Your Honors will so deem it.

Therefore, your petitioner respectfully prays that said opinion of September 6, 1933, be amended as to Your Honors may seem meet, proper or appropriate.

Dated, Los Angeles, California, October ....., 1933.

Respectfully submitted,

RAYMOND IVES BLAKESLEE,

KELLY L. TAULBEE,

Solicitors and Counsel for Petitioner.

Certificate of Counsel

We, Raymond Ives Blakeslee and Kelly L. Taulbee, being the solicitors and counsel of record for petitioner herein, certify that in our judgment the within petition is well founded and is not interposed for delay.

Raymond Ives Blakeslee,

Kelly L. Taulbee,

Solicitors and Counsel for Petitioner.

No. 6830

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

RONALD BAXTER,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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United States
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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

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UNITED STATES OF AMERICA, SS:

To Ronald Baxter, and to David Spaulding, his attorney. —GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 4th day of March, A. D. 1932, pursuant to an order allowing appeal filed February, 1932, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled RONALD BAXTER vs. UNITED STATES OF AMERICA, No. 3569-J, wherein the United States of America is defendant and appellant and you are plaintiff and appellee to show cause, if any there be, why the Judgment entered August 1, 1931, and the order denying a new trial entered November 17, 1931, in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. P. JAMES United States District Judge for the Southern District of California, this 12 day of February, A. D. 1932, and of the Independence of the United States, the one hundred and fifty-sixth.

Wm P James

U. S. District Judge for the Southern District of California.

Received copy this citation February 12, 1932. David Spaulding DH. Atty for Ronald Baxter.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit United States of America, Appellant vs. Ronald Baxter, Appellee. Citation Filed Feb 12 1932 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA. CENTRAL DIVISION.

RONALD BAXTER, Plaintiff vs. UNITED STATES OF AMERICA, Defendant.	No. 3569-J COMPLAINT.

Comes now the plaintiff and for cause of action against the defendant, alleges as follows, to-wit:—

I.

That the plaintiff is a resident of Los Angeles, County of Los Angeles, State of California. That he enlisted for military service in the United States, Army on the 30th day of March, 1918, and was honorably discharged on the 15th day of April, 1919.

II.

That while in the military service of the United States, during the war time period, desiring to be insured against the risks of war, said Ronald Baxter applied for a policy of War Risk Insurance in the sum of Ten Thousand Dollars thereafter there were deducted from his monthly pay certain sums of money as premium for said insurance. That a Certificate of War Risk Insurance was duly issued to him by the terms whereof the defendant agreed to pay said plaintiff, or his estate, the sum of $57.50 per month in the event he suffered permanent and total disability, but said policy was never delivered to the plaintiff.

III.

That while the said insurance policy was in force, on or about October 22nd, 1918, while engaged in active combat in the Argonne Forest with the American Army plaintiff received the following disabilities, to-wit: Gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, fracture of the fourth lumbar vertebrae.

IV.

That by reason of the foregoing the plaintiff was discharged, as aforesaid, totally and permanently disabled from gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, and fracture of the fourth lumbar vertebrae, and plaintiff has been informed and believes, and therefore alleges as true, that he will always be so disabled and never again be able to follow any substantially gainful occupation, by reason whereof he became entitled to receive from the defendant, $57.50 per month commencing on the 22nd day of October, 1918.

V.

That the plaintiff has made due proof of said total and permanent disabilities to the said defendant and demanded payments of the aforesaid amounts, but the defendant disagreed with plaintiff as to his claim of disability and has wholly failed to pay to the plaintiff the sum of $57.50 per month, or any part thereof. That at this time the plaintiff is totally and permanently disabled and has been since the date of said injuries.

WHEREFORE, The plaintiff demands judgement against the defendant in the sum of $57.50 per month from the date of said disabilities, together with interest thereon

at the rate of six per cent. per annum, from the several dates same became due and payable, and for his costs and disbursements herein incurred.

David Spaulding
Attorney for Plaintiff.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

RONALD BAXTER, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action: That he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

Ronald Baxter

Subscribed and sworn to before me this 3rd day of June, 1929

[Seal] J. H. Wixom
Notary Public in and for the said County and State.

[Endorsed]: No. 3569-J Dept. ..... In the United States District Court Southern District of California Central Division Ronald Baxter, Plaintiff vs. United States of America, Defendant Complaint Filed Jun 6—1929 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk David Spaulding 11340 Santa Monica Blvd, Sawtelle Mailing Address: P. O. Box 1031, Sawtelle, Calif. Attorney for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. 3569-J
	)	ANSWER
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

COMES NOW the United States of America, defendant in the above entitled cause, by its attorneys, Samuel W. McNabb, United States Attorney for the Southern District of California, Sharpless Walker, Assistant United States Attorney for said District, and R: M. Chenoweth, of counsel, and answering plaintiff's complaint, admits, denies and alleges:

I.

Answering Paragraph I of plaintiff's complaint, defendant admits that plaintiff enlisted in the United States Army on March 30th, 1918 and that he was honorably discharged therefrom on April 15th, 1919. Defendant alleges that it has no information or belief on the remaining allegations in said paragraph sufficient to enable it to answer and, on that ground, denies each and every allegation in said paragraph not herein specifically admitted to be true.

II.

Answering Paragraph II of plaintiff's complaint, defendant admits that on April 8th, 1918 plaintiff applied

for and was granted a policy of War Risk Term Insurance in the amount of Ten Thousand Dollars ($10,000.00), and that the premiums on the aforesaid insurance were deducted from plaintiff's monthly pay while in the military service. Defendant alleges that said insurance was payable in monthly payments of Fifty-Seven and 50/100 Dollars ($57.50) each, only in the event plaintiff suffered permanent and total disability while said insurance was in force and effect, and that plaintiff permitted said insurance policy to lapse for non-payment of premium due thereon on July 1st, 1919. Defendant denies each and every allegation in said paragraph not herein specifically admitted to be true.

III.

Answering Paragraph III of plaintiff's complaint, defendant denies each and every allegation contained therein.

IV.

Answering Paragraph IV of plaintiff's complaint, defendant denies each and every allegation contained therein.

V.

Answering Paragraph V of plaintiff's complaint, defendant admits that the defendant disagreed with plaintiff and has wholly failed to pay to plaintiff the sum of Fifty-Seven and 50/100 Dollars ($57.50) per month or any part thereof. Defendant denies each and every allegation in said paragraph not herein specifically admitted to be true.

WHEREFORE, defendant, United States of America, prays that plaintiff take nothing by this action; that plaintiff's complaint be dismissed; that judgment be rendered in favor of defendant for costs incurred herein, and for such

other and further relief as may be meet and just in the premises.

Samuel W. McNabb
SAMUEL M. McNABB
United States Attorney.

Sharpless Walker
SHARPLESS WALKER
Assistant United States Attorney.

R. M. Chenoweth
R. M. CHENOWETH
Of Counsel.

UNITED STATES OF AMERICA)
: ss.
Southern District of California)

SHARPLESS WALKER, being first duly sworn, deposes and says: that he is an Assistant to the United States Attorney for the Southern District of California, and one of the attorneys for the defendant in the within entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are herein stated on his information or belief, and as to those matters that he believes it to be true.

That the reason why this verification is made by deponent and not by the defendant is that the defendant is a corporation sovereign.

That the sources of deponent's information and the grounds of his belief are records, files and papers furnished by the United States Veterans' Bureau and official communications received from the Attorney General of the United States.

Sharpless Walker
SHARPLESS WALKER

SUBSCRIBED and SWORN to before me this 30 day of October, 1929.

R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.

[Seal] By B. B. Hansen
Deputy.

[Endorsed]: No. 3569-J In the District Court of the United States in and for the Southern District of California Central Division Ronald Baxter, Plaintiff, -vs- United States of America, Defendant. Motion to Strike Received copy of within Answer this 30th day of October, 1929 David Spaulding D H Attorney for Plaintiff Filed Oct 30 1929 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

Ronald Baxter, Plaintiff,)
) No. 3569-J-
Vs.) Law.
) VERDICT.
United States of America, Defendant.)

We, the Jury in the above-entitled cause, find for the Plaintiff, Ronald Baxter, and fix the date of his total and permanent disability from following continuously any substantially gainful occupation from the 22nd day of October 1918

Los Angeles, California, July 21st, 1931.

R. B. Barr
FOREMAN OF THE JURY.

[Endorsed]: Filed Jul 21 1931 R. S. Zimmerman, Clerk By Murray E Wire Deputy Clerk

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 3569-J
	)	JUDGMENT
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

The above entitled cause having come duly on for trial on the 21st day of July, 1931, before the Honorable William P. James, one of the Judges of the above entitled Court; plaintiff appearing in person and by his attorney, David Spaulding; defendant, United States of America, appearing by Samuel W. McNabb, United States Attorney, Clyde Thomas, Assistant United States Attorney, and H. C. Veit, Regional Attorney for the United States Veterans Bureau; a jury having been duly empaneled and sworn to try said cause; and evidence having been introduced by the plaintiff and by the defendant; the attorneys for plaintiff and defendant having duly made their arguments, and the Court having instructed the jury as to the law, and the jury having duly considered the evidence and the Court's instructions did on the 21st day of July, 1931, return a verdict in favor of the plaintiff as follows: "We, the jury in the above entitled cause, find for the plaintiff, Ronald Baxter, and fix the date of his total and permanent disability from following continuously any substantially gainful occupation from October 22, 1918," and in consequence thereof entitled to receive from the defendant

the sum of $57.50 per month commencing on the 22nd day of October, 1918.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendant benefits in accordance with the terms of his said War Risk Insurance policy at the rate of $57.50 per month commencing on the 22nd day of October, 1918.

IT IS FURTHER ORDERED that David Spaulding is entitled to receive from said Judgment, as a reasonable attorney's fee for his services as attorney in the above entitled cause, ten per cent of the amount of any and all monies due plaintiff in accordance herewith, and that he is entitled to receive a further sum of ten per cent of each and every payment, other than the said sum found to be due hereunder, hereinafter made by the defendant to the plaintiff, his heirs, executors, and assigns, in consequence of, or as the result of, the entry of this Judgment, said payments, however, to be made as by law in such cases provided.

DONE IN OPEN COURT this 1 day of August, 1931.

Wm P James
UNITED STATES DISTRICT JUDGE

Approved as to form, as provided in rule 44.
Clyde Thomas
Assistant U. S. Attorney

Judgment entered and recorded Aug 1 1931 R. S. Zimmerman Clerk. By Murray E. Wire, Deputy Clerk.

[Endorsed]: No. 3569 Dept. J United States District Court Southern District of California Central Division Ronald Baxter Plaintiff vs. United States of

America Defendant Judgment Filed Aug 1 1931 R. S. Zimmerman, Clerk. By Murray E. Wire Deputy Clerk David Spaulding Attorney at Law P. O. Box 581 West Los Angeles, Calif. Attorney for Plaintiff

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION.

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Law No. 3569-J.
	)	
UNITED STATES,	)	
	)	
Defendant.	)	

MOTION FOR NEW TRIAL.

Now comes the defendant and moves this Court for an Order Setting Aside the Verdict and Judgment herein and Granting a New Trial of the above entitled cause for the following reasons, namely:

(1) The Court erred in not sustaining defendant's objection to the introduction of testimony which was immaterial and irrelevant and not within the issues to be tried.

(2) The Court erred in not sustaining defendant's objection to incompetent and irrelevant testimony and not within the issues to be tried in that by the Court's ruling plaintiff was permitted to submit testimony at variance with the allegations of his complaint.

(3) The Court erred in not sustaining defendant's objection to the introduction of incompetent and irrelevant

testimony and not within the issues to be tried in that the defendant was taken by surprise and was not prepared to submit testimony in rebuttal thereto.

(4) The Court erred in refusing to direct a verdict for the defendant in that the testimony adduced by the plaintiff on trial was incompetent and irrelevant and not within the issues to be tried and without such evidence was insufficient to support a verdict for the plaintiff.

(5) Error in law occurring on trial of said cause in that the verdict was contrary to law.

This motion will be based upon the attached affidavits supported by points and authorities pertaining to the questions involved.

S W McNabb
SAMUEL W. McNABB,
United States Attorney.

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

H C Veit
HENRY C. VEIT
and

Ernest D. Fooks
ERNEST D. FOOKS,
Of Counsel.

Attorneys for Defendant.

Dated this 28th day of October, 1931.

Re Baxter, Ronald

AFFIDAVIT

I, Guy R. White, after first having had explained to me the meaning of Section 25 of the War Risk Insurance Act, and Paragraph 2 of Section 14 of the Act of August 9th, 1921, which respectively provided penalties for making any statement of a material fact knowing it to be false, and knowingly making a false and fr*ad*ulent affidavit or other writing, in connection with any claim for family allowance, compensation or insurance, was duly sworn, and on my oath, depose and say:

That, I am Captain of Company 8, Domiciliary Bks, National Soldiers Home—that Ronald Baxter has been Sergeant of the Company for the past eight months; that we are in daily contact; that while during that time I have noticed that his physical condition was not first class, I have never noticed any indication of any mental trouble, nervousness, excit*e*ability; that he seems to be level headed and diplomatic when the occasion calls for diplomacy; that he occasionally shows a physical nervous condition after having done extra work or exertion—but that this does not seem to arise from any mental condition.

Guy R White

Affiant

Subscribed and sworn to before me this 6th day of August 1921

William S Rawlings

FIELD EXAMINER, U. S. Veterans' Bureau

LEG (Inv) #14

I, Frank L. Long, being first duly sworn, depose and say:

That I am a specialist in mental and nervous diseases, on the staff of the Veterans Administration; that I am Chief of the Neuropsychiatric Unit of the Veterans Administration, Los Angeles, California.

That I have carefully examined all of the medical records and reports of examinations made by both government doctors and doctors in private practice, in connection with the files and records of Ronald Baxter now on file with the Veterans Administration; that the first report of examination was made April 26, 1919, and the last examination was made October 12, 1931, with frequent re-examinations appearing in between these dates; that in all of these examinations I have carefully read the history and complaints and subjective symptoms given by Ronald Baxter to the examining physician on the date of each examination, and I do not find any complaint of a mental or nervous disability, and further I do not find as the result of these several examinations, any evidences or indication whatsoever of a mental or nervous disability; that the last examination made October 12, 1931, by a board of three medical experts, shows no symptoms, subjective or objective, nor discloses any history of a mental or nervous disability.

Further affiant sayeth not.

Frank L Long M. D.

FRANK L. LONG, M. D.

Subscribed and sworn to before me this 20 day of October 1931.

[Seal] J. T. Graham
Notary Public

My Commission Expires Jan. 24, 1935

[Endorsed]: No. 3569-J In the District Court of the United States for the Southern District of California, Central Division. Ronald Baxter, Plaintiff, vs. United States, Defendant. Motion for new trial. Filed Oct 28 1931 R. S. Zimmerman, Clerk By C A Simmons Deputy Clerk

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At a stated term, to wit: The Sept. Term, A. D. 1931, of the District Court of the United States of America, within and for the Cent. Division of the Southern District of California, held at the court room thereof in the City of L. A. on Tues. the 17th day of November, in the year of our Lord one thousand nine hundred and thirty-one.

PRESENT: THE HONORABLE WM. P. JAMES District Judge.

Ronald Baxter, Plaintiff,	)	
	)	
vs.	)	No. 3569-Civil
	)	
United States of America, Defendant,	)	

The motion of the defendant for a new trial herein is denied.

(Testimony of William S. Rawlings)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

RONALD BAXTER,	)	
Plaintiff,	)	
vs.	)	
UNITED STATES OF AMERICA,	)	No. 3569-J
	)	
Defendant.	)	

DEFENDANT'S ENGROSSED BILL OF EXCEPTIONS

Be it remembered that the above entitled cause came on regularly for trial on the 21st day of July, 1931, before the Honorable Wm. P. James, one of the judges of the above entitled court, plaintiff appearing in person and by his attorney, David Spaulding, defendant, United States of America, appearing by Samuel W. McNabb, United States Attorney, Clyde Thomas, Assistant United States Attorney, and H. C. Veit, Regional Attorney for the United States Veterans Bureau, of counsel, a jury having been duly impaneled and sworn to try said cause;

WHEREUPON, the following proceedings took place:

It was stipulated that plaintiff's War Risk Insurance Policy was in force including the grace period to the 1st day of August, 1919.

WILLIAM S. RAWLINGS,

the witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

My name is William S. Rawlings. I am Field Examiner of the United States Veterans Bureau in which capacity I have control and custody of the records of

(Testimony of Ronald Baxter)

various pensioners of the United States Veterans Bureau. I have custody of the records of this plaintiff, Ronald Baxter, which records pertain both to compensation and insurance. The Adjutant General's Report shows concerning Ronald Baxter at the time of his discharge as follows:

"That he has a wound, nature and location of which are as follows:

"Shrapnel (1) Scar 10 inches long oblique through lower Lumbar and Sacral region fracturing spine at 5th Lumbar Vertebrae and crest of left Ilium. (2) Superficial Scar Posterior surface of wrist left. In line of duty. Disability 30%. Maximum Improvement Attained.

"The wound, injury, or disease is likely to result in death or disability.

"In my opinion the wound, injury, or disease did originate in the line of duty in the service of the United States.

"In view of occupation, he is 30 per cent disabled."

RONALD BAXTER,

plaintiff, was then called and after being duly sworn, testified as follows:

I have been a resident of Los Angeles County for about eight years. I now live at the National Home at Sawtelle. On the 22nd day of October, 1918, I was with my regiment in the Argonne Forest. We were under heavy shell fire and I received a shrapnel injury to the wrist. A few minutes later I was injured in the spine by shrapnel which almost cut me in half and paralyzed me from the

(Testimony of Ronald Baxter)
waist down for several months and put me in the hospital for months. I lost considerable blood from the wound owing to the fact that I was left in the field until stretcher bearers picked me up. I served in the St. Mihiel Drive and in the Argonne Forest. I remained in the hospital from the date of my injury until I was discharged in April, 1919. I was unable to move out of bed for at least nine or ten weeks. At that time I could not move my legs. I suffered considerable pain and discomfort across the back. I had pains in the back of my head. I was bothered with stomach trouble. I was unable to pass urine without aid. After my discharge from the service, I went to Omaha, Nebraska. Before going into service, I had done ranch and similar work on a cattle ranch which was steady prior to the time I entered the service. After returning home, I secured a job as night watchman with which I remained for about two months. Part of the duties required that I handle heavy oxygen drums and I could not handle them because the strain on my back was too great and I suffered from physical exhaustion. I suffered from back pains and leg pains. My official capacity there was night watchman. At that job I earned $22.00 a week. I then accepted vocational training under the Veterans Bureau. They sent me to Lincoln, Nebraska, to take an agricultural course which I took for two semesters and then I was taken out of the agricultural course and given a music course which I took for two or three years. I was taken out of music by the Bureau and put into a business course and put into a salesmanship course and then finally declared as unfeasible for further training and dropped it. I had difficulty concen-

(Testimony of Ronald Baxter)

trating on my studies; the result was that I did not give the progress that the Bureau required, and so I was taken out of the training for that reason. I was of an extremely nervous nature, and could not bring my mind to bear on the studies for any length of time and had difficulty getting rest at night because of injuries that I received in service. These same things held for the other studies, the other objectives that I took up. I sought employment. I got a job with the Dixon Book Company for about two weeks. That is I could only carry on the work for about two weeks; selling books required walking considerably and I could not stand on my feet or I could not walk any great distance, and consequently I had to give it up after two weeks. Upon the completion of my training I sought employment with the Goodyear Tire and Rubber Company in Los Angeles, and also with the telephone company. I was subjected to a physical examination by both companies and turned down. I then sought a job as stock salesman for the Shore Investment Company on a purely commission basis, and that required walking considerably on the hard pavements and I could not maintain the pace so I had to give it up. I experienced considerable difficulty and discomfort at all times, especially when I am on my feet or walking. The discomfort is across the small of the back where I was injured by the shrapnel and in the left hip. The left leg also is extremely weak at times. I have difficulty getting required rest at night because of the pains and still have difficulty with my kidneys and am bothered with stomach trouble ever since discharge in the assimilation of food. The conditions I have described continue up to the present time. I have pain in my shoul-

(Testimony of Ronald Baxter)

ders, in the back of my head at all times. I used to use a brace but I have dispensed with it to some extent but cannot now hold my body up easily. I am a sergeant of a company at the Soldiers' Home at Sawtelle. The duties are taking care of picking up laundry and distributing laundry, and property, company property, to the men, and looking after the company generally. The actual work amounts to about an hour a day. I was not required to work continuously. The duties did not require it. I could do all the work there was to do in less than an hour, and then I was free to do as I pleased from then on, as long as I stayed around the company. At first, my salary was $28.00 a month which has since been increased and I now get $40.00 a month.

CROSS EXAMINATION

BY MR. THOMAS:

Q When did you go into the Home, did you say, Mr. Baxter?

A 1924.

Q Is that a hospital?

A Well, there is a hospital there, but the barracks is where I went.

Q Just a place to live?

A A place to stay, yes.

Q A place to stay. Does it cost you anything?

A Costs me anything?

Q Do you have to pay for board and room?

A No.

Q What did you do to earn a living previous to going into the hospital?

A Previous to going into the service, do you mean?

(Testimony of Ronald Baxter)

Q No, previous to going to the Soldiers' Home to live, that is what I meant to say.

A I was under the Veterans' Bureau, Vocational Bureau.

Q And that supplied you your living, you mean?

A Yes, that supplied money to pay it.

Q And that was true at all times from the time you left the service?

A Yes, that was true.

Q And it is still true? Do you still get compensation from there?

A Not vocational.

MR. SPAULDING: I object, if the Court please, as not material.

A Got compensation, but not vocational pay.

MR. SPAULDING: It is immaterial in this action, if the Court please.

THE COURT: It is immaterial except showing and bearing on the question of his having had work or not, as to how he supported himself. The matter of whether a man receives compensation has no bearing on the question as to whether he is entitled to insurance.

MR. THOMAS: It was only asked for the purpose of showing employment.

THE COURT: I understand.

Q BY MR. THOMAS: Did you go to work at the Soldiers' Home shortly after moving there to live?

A Yes, right after moving there.

Q What was your job at that time?

A Elevator operator.

(Testimony of Ronald Baxter)

Q Elevator operator. How long did you continue at that job?

A I should say, three or four years.

Q Three or four years. Were you janitor part of the time?

A Well, it was classified more or less as janitor.

Q And were paid for that work?

A $24 a month.

Q $24 a month?

A Yes, sir.

Q Now, previous to going to the Soldiers' Home to live, did you say you did some work other than in vocational training?

A Other than vocational training.

Q What work did you do?

A I attempted to sell stock for the Shore Investment Company, also worked two months for the Belcher Company, Omaha; I worked for an oxygen company in Omaha two months; the Dixon Book Company, Lincoln, Nebraska, for about two weeks, and for the Shore Investment Company, Los Angeles, for about two weeks.

Q. And that is the entire work that you did except during vocational training?

A With the exception of vocational training, that is all.

Q How long did you say you had on the agricultural course in vocational training?

A About two semesters, as I remember.

Q That is how long?

A Something like three or four months. I am not sure.

(Testimony of Ronald Baxter)

Q A semester is three or four months?

A I am not sure now just how long. I don't remember.

Q What was that work? What work did you do on that course?

A Studied chemistry and physics, farm motors and dairying.

Q Did you do any actual farm work in the course?

A No.

Q What did you do previous to going into the army?

A I did mostly farm work, ranch work.

Q Where?

A Yes.

Q Where did you live?

A I lived on the farm.

Q But, whereabouts in the country, what state and city and town?

A In different states; in Kansas and Texas.

Q How old were you when you enlisted?

A I was 25.

Q You testified a minute ago that you worked from the time you left school until you entered the army, is that correct?

A Yes.

Q When did you leave school?

A When I was about 14.

Q When you were 14?

A Yes, sir.

Q What school were you in?

A I received my education in New Zealand

Q In New Zealand?

A Yes, sir.

(Testimony of Dr. Thomas J. Orbison)

Q What place were you working when you enlisted in the army?

A When I enlisted in the army I was working for the Alvarado Dairy Company of Omaha.

Q And that had been your home how long?

A I don't recollect just how long; several months.

Q How long had you been on that job, would you say?

A I had been on that job about two or three months, I think; I am not sure.

Q Not for a long period of time, though?

A No.

Q Where had you been previous to that?

A I had worked for Reed Brothers, as commissary clerk.

Q Whereabouts?

A On Leavenworth Street, Omaha.

Q How long had you lived in Omaha?

A Oh, I suppose about 18 months; I am not sure.

MR. SPAULDING: Speak up, please, Mr. Baxter.

A About 18 months; I am not sure exactly.

Q BY MR. THOMAS: How many jobs had you had while you were there?

A Those two.

Q Those two?

A Yes.

DR. THOMAS J. ORBISON,

the witness in behalf of the plaintiff, after being first duly sworn, testified as follows:

My name is Thomas J. Orbison. I am a physician and surgeon. My practice is entirely limited and has been for over twenty years, to mental and nervous diseases.

(Testimony of Dr. Thomas J. Orbison)

I was graduated at the University of Pennsylvania Medical School, 1898, with degrees of Doctor of Medicine and Doctor of Medical Jurisprudence, and I went into the —took my interneship the next year. I did not start practice right away because I went right into the Spanish American War, not as a doctor, however, but as a private in a cavalry troop. The next year, took two years interneship at the Pennsylvania Hospital in Philadelphia. Later on, I was connected with the University of Pennsylvania in a teaching capacity as assistant instructor in mental and nervous diseases there; and also, by the Polyclinic Hospital in Philadelphia, that is, teaching and hospital assistant at the Orthopedic Hospital, that is, in the department of mental and nervous diseases of that hospital. At those three hospitals, I suppose I approximated two and three hundred cases every month, I saw at various times in mental and nervous diseases, then coming out here in 1907. Since that time, in 1912, I became a member of the Lunacy Commission of Los Angeles County, have been there ever since, assistant of Neurological—Neuro-Psychiatric, it is called. That means mental and nervous diseases department out here at the General Hospital, the old County Hospital, now called the General Hospital. Then, I was in the same capacity at the children's—in the same capacity at the Santa Rita Clinic of the Catholic Hospital Bureau; in the same capacity out at Whittier's Day School. As long as Fred Mellus was alive, three years, I have been expert medical examiner for the State Industrial Accident Insurance Commission. It has been in that capacity I have seen most of my traumatic injuries, severe traumatic injuries, except during the time

(Testimony of Dr. Thomas J. Orbison)

I was in the army. I was overseas, but not very far, by the way, from one of the hospitals where this man was after he got back from the front. I was in the hospital organization not very far from him, and later on I was up in Russia for a time. I had a personal experience there with high explosives. The shell entered my office just above my head and exploded there. I know a little bit, from personal experience, what it is to have some nervous trouble following the concussional high explosive shell. Today I can't walk more than a couple of blocks at this time, although I hope to.

Q Are you through—pardon me?

A That is all I can say.

Q Will you tell the jury, just describe the spine and its connection with the nervous system, that is, just what portion or what the spine does.

A Well, to be as brief as possible, if you have ever seen a skinned eel, you will know just about what the spinal cord looks like as it lays there in the bony canal, called the bony spine. It lies in, right from the vertebra, right down about that far from the end of the bony canal (illustrating). Now, as it lies in there, from the side, coming off from both sides you see nerves. If you cut that spinal cord across, you will see sort of an H-shaped thing rather—I can show you in a picture easily enough—but rather an H-shaped thing, all different colors, the H being rather gray, called "the gray matter of the cord," and with surrounding tissue being white, called "the white matter of the cord." Now that gray matter is all composed of cells. Under the microscope you can see those cells. From the anterior portion, that is, from the front

(Testimony of Dr. Thomas J. Orbison)

toward this way (illustrating), come out the motor nerves; and those branching out from the posterior side are the sensory portions. Now, of course, motion comes from those out, and the sensory come from outside in. Now, just immediately almost after those branches have come out from that eel-like looking structure, they join a little knob there called the ganglia, and then they go out and go to their respective muscles and tissues. Now, the very important thing, that is what we call the sensory motor side—motion and sensation—but, right alongside of that bony spine there is a very important nervous system, what we call the "vegetative nervous system." It looks like a chain, chain or knob-like little keys joined by a slender material. That is what is called "the sympathetic nervous system." We speak of it as the vegetative nervous system. Now, that is very, very—hugs the spine all the way up, and that is very intimately connected with the emotional side of us. It also goes to all the smooth muscles of the body. Those smooth muscles are all the muscles of the heart, all the muscles of the arteries, all the internal glands, all the smooth muscles of the intestines, so it is very important. So, that is in general—I mean in brief—what the picture of the nervous system is.

Q And the spine and the brain are connected, isn't that true?

A Oh, yes, of course the spinal cord connects immediately up through the medulla oblongata.

Q Now, Doctor, did you at my request in this case, make an examination of the plaintiff's back?

A Yes.

Q When did you make that examination?

(Testimony of Dr. Thomas J. Orbison)

A (After producing memorandum.) I made that examination under July 2nd. I spent, I suppose, two and a half—two hours or two and a half hours making that examination on July 2nd, 1931.

Q And will you just state to the jury your conclusions, from your viewpoint as a psychiatrist and physician, as to the plaintiff's physical condition, that is, as to what he has subjective and your diagnosis of that?

(At this point, defendant objected to any evidence of disability because of mental and nervous diseases which objection was overruled and exception allowed.)

A You get a much clearer idea by seeing what it looks like. (Demonstrating on plaintiff's body.) Now, you see for yourself where that wound is. Now, when that was fresh it was pretty bad and when he was examined first, of course he was brought in and, naturally, would be on his belly, because you would not put him on his back, and I saw the examination made just shortly after he was wounded, but they found no—as they call it—no cord injuries. What they meant by that, evidently, was because they could not possible have the time or the ability to make a thorough neurological. They found probably there was some stiffness of the legs and feet; in other words, there was not a flaccid paralysis, and I think what they said was entirely right. In other words, they did not find that this spine or cord had been severed. I think they were entirely right in that. Now, just above here—stand up straight—pull that up, will you? The cord comes down on the inside (indicating). * * * I am kind of ambi-dextrous, anyhow. That is the spinal cord coming down and spaced inside the bony canal. I will say this for the bony canal:

(Testimony of Dr. Thomas J. Orbison)

That is on the front side, anterior side. The bone down there or vertebra would be pretty near that thick (indicating), whereas, the bone at the peak would be only about that thick, so if he were shot at the back—of course, this has all been worked out very well physiologically in *in* laboratories, the effect of shock on the spinal cord by trauma. Naturally, there is not a very big space, not much between the shock and the cord at his back compared with what it is in the front. Well, the cord runs down there and the nerves come off to the side down here—I am sorry, he is very—his skin is very irritable, but I have to do this to show you. That is all hidden by this bone down in through here. These nerves that come down here that move the legs, the sciatic nerves and the motor nerves to the legs come down the inside and then come out. Now, if you will notice, anything below that area of shock is going to be affected. I mean, that is as plain as the nose on your face. You can't get away from it. What you would see if you would look inside there would be probably a shrunken cord and little areas in little ridges of hemorrhagic—we call them pin-point or shotgun hemorrhages that take place there after a severe shock of this kind when a man is shot with high explosive. I can't tell you the amount of force used because I don't know, but it is worse than the kick of a mule. So, what happened to him after this, of course, this big jagged wound was there; they dressed it, and what happened to him—I think that is all.

(Plaintiff replacing his clothes.)

A (Continuing.) —he could not make voluntary use of his legs although, I venture to say, that the legs them-

(Testimony of Dr. Thomas J. Orbison)

selves were rather stiff than flaccid. Now, if the cord had been cut across, in other words, if there had been a complete severance there, he never could have used those legs at all; they would have been flaccid. You see the difference, it was the shock and not a complete severance of the cord.

Q Now, Doctor, what is your diagnosis concerning this injury?

A What?

Q Your diagnosis, will you give it to the jury?

A My diagnosis is as follows, and it is corroborated by both the history and my physical findings—

MR. THOMAS: Just a minute, Doctor. Doctor, just a minute. We do not want the corroboration. He asked you for your diagnosis.

A Yes.

Q BY MR. SPAULDING: Just give your diagnosis.

A All right; I beg your pardon. Gunshot wound in the lower dorsal region, the lower back, with concussion of the spinal cord consequently or sequentially. That is what followed. What followed that, psychoneurosis. What is the type of the psychoneurosis? That is the neurasthenic type. That is my diagnosis.

Q Now, Doctor, considering in this case the definition of a total disability is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, in your opinion, is this man so totally disabled at this time?

A There is no question about it; he is.

Q Considering the same definition—

(Testimony of Dr. Thomas J. Orbison)

A (Continuing.) That is, there is no question in my mind.

Q Yes, that is what I mean. Considering the same question, Doctor, and assuming that on the 22nd day of October, 1918, this man was injured by a shell as you have seen and described—

A Well, it is shrapnel, as I understand, and not a shell.

Q Yes. Well, assuming that he was so injured, assuming that the diagnosis at that time showed this scar and a fracture of the fifth lumbar vertebrae, and assuming since that time—now, with those facts there, what would your opinion be as to his total disability on the date of his injury, considering the same definition?

A He was totally disabled, that is all.

Q Considering that, Doctor, that since that time he has experienced pains in his legs, in his stomach and his kidneys, considering that those conditions have continued to the present, in your opinion, has he been totally disabled as used in that definition since the 22nd day of October to the present date?

A Oh, yes. He may have—by "totally disabled," he may have been able for a little short time, a few days, maybe a week or so, to make good.

Q In your opinion, Doctor, were these impairments at the time of their inception based on conditions which rendered them reasonably certain to remain with him throughout his lifetime?

A Oh, yes.

MR. SPAULDING: That is all, Doctor. You may cross-examine.

(Testimony of Dr. Thomas J. Orbison)

CROSS EXAMINATION

BY MR. THOMAS:

Q Will he ever get any better, Doctor?

A A little louder, please.

Q Will Mr. Baxter ever improve, that wound, the result of it?

A The spinal cord will never improve. I can't say whether the psychoneurosis will improve or not. It lasted for quite a while. Look at him. He is six feet and several inches tall, weighs 137 with his clothes on. I would not be surprised if he had tuberculosis. I don't know that, but I mean it would not surprise me a bit. I am not saying that for effect, mind you.

Q Just answer the question.

A I did.

Q Just a minute, Doctor.

A Yes.

Q Will you answer the question and nothing else, please? What are your specialties as a doctor?

A Mental and nervous diseases.

Q How long have you been practicing them.

A Over 23 or 24 years; my practice has been entirely limited to that for 23, 24 years.

Q Where?

A Here in Los Angeles.

Q In Los Angeles?

A I mean in California.

* * * *

Q Have you ever doctored a back injury?

A Have I ever what?

Q Doctored a patient with a back injury.

(Testimony of Dr. Thomas J. Orbison)

A Well, I should say so.

Q Such as this one?

A That is pretty hard to say exactly. No, not just exactly like this, if you mean that by such—I will give you an instance of—

Q. I don't want that.

A You don't. You ask me questions, but you don't want the answers, don't you see? I mean, apparently that is the way it looks to me.

Q Well, when I said "like this one," I didn't mean in every detail, Doctor. I mean where the back was damaged by a gunshot wound or a fracture of any kind.

A Oh, yes, I have seen quite a number of them. I won't say that I have treated. I have made the examinations of them. In regard to that, I am not a bone man; I would refer that kind of a case, as far as the treatment, to a man that was a specialist in diseases of the bone. As regards his nervous condition, however—

Q I don't want that, Doctor.

A I would treat that.

* * * *

Q BY MR. THOMAS: Now, did you ever see this man previous to the date you examined him, July 2nd—is that the date you have testified?

A No, as I say, that is the first time I saw him. I saw him about two hours, two and a half hours at that date.

Q Did I understand your testimony here, that the spinal cord was not severed?

A Yes.

Q Which vertebra was injured?

(Testimony of Dr. Thomas J. Orbison)

A I think probably a number of the vertebrae at the lower part of the dorsal region and the lumbar region were injured.

A The fact is, the injury to the vertebrae is rather minor, as compared with the injury to the cord, you understand. I do not think that there was much damage to the vertebrae themselves, that is, I do not think that they were torn, so the history shows that the fifth, I think it was, that was broken—I am judging by the outside appearances, what I see there, and if that man was deaf and dumb and couldn't tell me a word, it would be easy for me to answer those questions.

Q Do you know which vertebra was injured? I don't care what you—

A (Interrupting.) I think it was the fifth one was said to be injured.

Q I don't want what was said. I asked you if you knew, of your own knowledge.

A Oh, no, certainly not. I didn't see it. I didn't even see the X-rays.

Q Did you take one when you examined this man?

A Certainly not; no, no. That was not necessary; it was not up to me to do that at all. I was there to give my opinion as to the result of that injury upon his nervous system, and not the result of the injury upon his bones at all, although I am not a specialist in bone injuries.

Q Then, your results are given and your diagnosis was made on what was told you, is that correct?

A No, certainly not. I tried to tell you that if that man had not told me a word and I, having made my examination, I could have made a pretty fair neurological

(Testimony of Dr. Thomas J. Orbison)

diagnosis. However, it would require—I will go farther, and say that I would want more than that to know, so as to enable me to make a diagnosis upon psychoneurosis. Does that answer your question?

Q Do you know, outside of what was told you, any more about that than what you can see and just showed the jury?

A Now, if you will just connect a little closer and tell me just what you mean by that. I want to answer your questions exactly as you want me to.

Q I understood you to say just now Doctor, that you have made your diagnosis on what you knew?

A Upon what I saw and what he told me.

Q All right.

A Yes.

Q Now, eliminating what he told you—

A Yes.

Q —can you make a diagnosis?

A I can make a neurological diagnosis, yes.

Q What is that?

A Concussion of the spinal cord at about the level of the lower dorsal vertebrae, beginning up around in that general neighborhood (indicating); and that means that the level is there but a concussion extends both ways, so the area of concussion is more extensive than the area of the injury. Do you understand?

Q Yes.

A Yes.

Q All right. Now, how do you know that that took place in him, that that concussion was there, if you eliminate what he told you?

(Testimony of Dr. Thomas J. Orbison)

A How do I know that what?

Q That there was any concussion?

A All right. I see a jagged wound, long and wide at a certain level at the present time, the scar of it is at the lower level of the spine. I naturally would not know that that was done by shrapnel unless I had been told. It could have been done by some jagged instrument. If it had been done by a jagged instrument like a saw bayonet, for example, he would not have been, in my opinion—of course, he would not have symptoms of organic lesion of the cord, do you see? Now, wait a minute. And so I came to the conclusion that what had caused that, especially as he had on his other parts of his body evidences of a wound, I came to the conclusion that he had been shot, and that that was the nature of the original injury; and, because I find at the present time evidences of organic lesion remaining in the spinal cord, I came to the conclusion that whatever it was that caused that original injury, caused an injury to the spinal cord, not the spinal column necessarily at all, but to the spinal cord, that is. I mean, without doubt, that is to my mind what I found by objective symptoms.

Q Now, I don't remember your answer, but after getting this additional information, if you answered it, I want to ask you again: Is he liable to get worse, or will it get better, from your experience as a doctor?

A You ask me a very hard question. I can't say that I can give an explicit answer. I would only say this, that my opinion is, that don't get better, that is all. It has been going on for a long time, which leads—well, you don't want any more, I suppose?

(Testimony of Dr. Thomas J. Orbison)

Q What?

A What?

Q I didn't hear you, was all. Will it likely get injured and become worse from injury in any way?

A Pardon me?

Q Is it so that it might easily become hurt further?

A Hurt?

Q No, I don't mean painful; I mean, is that condition in the cord liable to become worse from anything that he might do?

A Do you mean the organic lesion in his cord?

Q Yes.

A No, I think it is the other way around; it will prevent him from doing, rather than be injured by what he does. Of course, he might fall down and break his back and hurt it over again, but I mean the ordinary, rather than extraordinary.

Q Ordinary conduct of affairs?

A I don't believe he can do enough to hurt himself.

Q Will his effort to do something hurt him?

A What?

Q Would an effort on his part to do something hurt him? I mean, hurt his cord and make it worse? I don't mean to make that painful.

A Hurt his cord?

Q Yes.

A Oh, no, I don't think so. No, no, I don't think so. In fact, I think that he ought to do just as much as he can physically, whatever he can do. He can't do—he couldn't do—he shouldn't do a heavy day's work. He might one day.

(Testimony of Dr. Thomas J. Orbison)

Q If he did light work, Doctor, would his cord get worse?

A You say if what?

Q If he did light work every day, would the condition of that cord get worse?

A No, I don't think so.

MR. SPAULDING: What was his answer?

MR. THOMAS: "No, I don't think so."

Q Do you think he could handle a job at running an elevator without hurting himself?

A Put it this way: I would not hire him.

Q That is not what I asked you, Doctor.

A Pardon me.

Q That was not what I asked you.

A All right; put it the other way: No, I don't think he can, because he would not be able to hold it very long, that is, in my mind.

Q That is not what I asked you, Doctor.

A What is it you asked me?

Q I asked you if he could do the work without injury to himself.

A Yes. No, he could not without injury to himself. If you were to limit that to "without injury to the cord lesion," I would say yes, he could do it without injury to the cord lesion; but, without injury to himself, no.

Q Why would it injure him?

A I know what I am talking about. I have run an elevator.

Q Why would it hurt him and not hurt the cord?

A What?

Q Why would it hurt him and not hurt the cord?

(Testimony of Dr. Thomas J. Orbison)

A Because that is the very point I am trying to get at, because he has a psychoneurosis; that man can't concentrate sufficiently; he is not safe, that is the trouble.

Q Doctor, is he—

A He would not be safe. I am speaking seriously. He should not run anything that—now, wait a minute—of that nature where it requires that kind of judgment. Running an elevator, you have got to stop that elevator at a certain place and you have passengers in it, or, if it is a commercial elevator, you have got different kinds of problems on your hands, and he could not stay with it, that is all there is to it. I doubt whether he could even stick out the hours. I am honest in that. He has a decided, to my opinion, he has a decided psychoneurosis and he has an involvement of that vegetative nervous system that he got at the same time as he got his shock to the cord. I did not speak of that, because you did not ask me about it.

Q Then, I haven't asked you yet, either, Doctor.

A But I think I can tell you about that. He shows evidences of shock to that vegetative nervous system that lies right up along—that hugs that cord, this dermographia. I didn't show it to you when he was there, but I noticed how he winced, how he has dermographia structure with his back; for example, if I struck him with not a sharp object but a blunt object over a number of moments, he would look like he had been painted red; all those little arteries that flush up there are controlled entirely by that vegetative nervous system.

Q Doctor, let me ask you some questions again, please, if you are through talking to them over there. Don't

(Testimony of Dr. Thomas J. Orbison)

you as a rule, Doctor, as a nerve specialist, prescribe for your patints that they keep occupied and not be idle?

A Yes, I am kind of—it is one of my hobbies.

Q Answer "Yes" or "No", please.

A I say, "Yes." Now, I would not say "as a rule," because I have no rule upon that subject, but very, very frequently, I have prescribed it, but it is prescribed—wait a minute—that is the very point, it is prescribed in dosage. I do not say to that man, "you go and get a job and you work your ten hours a day." Not for a minute. I prescribe for my patients the kind and quality of the work that they shall do, and kind, if I am doing it for an especial purpose.

Q Did you take an X-ray of this patient, Doctor, when you examined him?

A No, no, I didn't. I don't do that work.

Q Would that have been a help to you in telling how much concussion there was in that backbone?

A No, no, it would not. The X-ray would not show the cord at all scarcely; it would show the bony side. Of course, it would show if there were any fracture there. If there were any fracture there, it might possibly show and might possibly not, but for my purposes it was not necessary.

Q Would this man become worse, Doctor, if he had a job as a janitor?

A Would he become worse?

Q Would it hurt him, yes, injure, or injure his spinal cord?

A It would not hurt him if that job could be regulated according to his abilities to perform. Remember, he tried a job of night watchman, if you will recall the history.

(Testimony of Dr. Thomas J. Orbison)

Q I do not want what he has done; I am asking you a question.

A I say, if—yes, I will answer your question, "Yes," if he could get a job that was within his limits I think it would be a good thing. I think any kind of work that he could do that would be within his limits to perform would be helpful to him, put it that way.

Q Could he work as a gate man at a railroad crossing without injury to himself?

A You say what?

Q Could he work as a gate man at a railroad crossing without injury to himself?

A Well, he wouldn't hurt himself, but it might be terrible for the other people.

Q It would not make his physical condition—

A (Interrupting.) This man can't concentrate. Don't you see, he can't keep his mind on anything sufficiently. He gets frightfully tired out.

Q How many times did you see him. Doctor?

A I saw him only once. He spent about three hours there.

Q Then, you are telling what he told you, aren't you?

A I am telling you the whole thing.

Q You are telling us what he told you now, aren't you?

A Oh, no. He didn't tell me all this at all, no. Do you want what he told me?

Q No, that is not what I asked you.

A No, you don't want to know what he told me.

A JUROR: Your Honor, may I ask the doctor a question, please?

THE COURT: Yes.

(Testimony of Dr. Thomas J. Orbison)

THE JUROR: In arriving at your conclusion, Doctor, or, I should say, when a doctor of mental cases comes to a conclusion that a person has not got the power to concentrate, isn't it usual to give them some mental test in order to determine that?

A In answer to that question, I would say in this way: That if you believe that that lack of concentration is due to a faulty intelligence, then you can give what we speak of as intelligence tests. Now, if you feel, however, that he is, we will say, up to the adult intelligence level or above, then the complaint is that he can't concentrate, why, you have got to fish back and dig around in his history to see what he has done, what he can't do, according to all the statements you can get. In other words, there is no tape measure.

Q BY THE JUROR: No, but the question that I want to know: You say that he could not do such things as to run an elevator, he would not have the concentrative power to be able to start and stop the elevator and it might be dangerous.

A Yes.

Q BY THE JUROR: Now, aren't there tests that can be given to determine the reaction and the speed of reaction on a man under certain circumstances?

A Yes.

Q BY THE JUROR: Don't you give those tests?

A That can be done, but in a psychoneurosis those tests are not valuable. I will tell you why: They vary; on a good day he may perform very nicely; on a bad day, he may not perform at all, see.

(Testimony of Dr. Thomas J. Orbison)

Q BY THE JUROR: Then, you would have to give tests from time to time over a considerable period to determine?

A Yes, and that is the reason why I say that the history of what he actually has done and not been able to do is really and truly valuable.

Q BY THE JUROR: You haven't given him any test to determine to your own satisfaction whether or not he has the ability to concentrate, such as placing squares around, and those different tests that they very often give?

A No. I think maybe you are speaking of reaction time tests.

Q BY THE JUROR: Yes, I am.

A The normal reaction time in response to a stimulus. His reaction, of course, his response to stimuli should be, the normal is about a ninth of a second, see.

THE JUROR: Yes.

A Now, if for any reason, say, a mental hazard, if we try him for a mental hazard, the "halt and stop," why, you check up how quick they halt, and halt and stop and go, but that is not ability to concentrate; that is a mental hazard. Where there is a lack of ability to concentrate, we have no such tests that are at all accurate. Unfortunately, in that respect, we just haven't got them.

THE JUROR: Thank you very much, Doctor.

Q BY MR. THOMAS: Doctor, you state that such patients vary a great deal from day to day?

A Yes, they do.

Q Some days they are up and some days down, is that right?

(Testimony of Dr. Thomas J. Orbison)

A Even so, yes, and many times that is true.

Q And you drew the conclusion from an examination of this man once, is that right; was he up or down that day?

A Oh, well, his spinal cord is not up or down.

Q You stated you did not examine his spinal cord.

A I examined the objective symptoms.

Q Oh, you examined more of his spinal cord than what you showed to the jury?

A No, I found evidences of organic lesion of the spinal cord. Now, that does not change from day to day.

Q Doctor, did you examine that spinal cord more than what you showed it to the jury?

A Why, yes, I did.

Q What further examination did you make of his spinal cord than what you showed here?

A I went completely over his reflexes; I went over his skin reflexes, his tendon or knee jerks, his plantar reflexes.

Q And do those things all result from that injury in that particular place in the spinal cord? Could they be there from any other injury?

A Oh, yes, this man could have been shot somewhere else or he could have been—he could have had a spinal lesion along the spinal cord somewhere else and still showed this, but he would have had a spinal lesion from some place.

(Testimony of Dr. Thomas J. Orbison)

Q Could he have had that from anything other than a concussion?

A From what, other than a concussion?

Q Yes.

A Oh, yes, anything that would injure the spinal cord and cause a lesion of the spinal cord, but not cause complete severance of the spinal cord would give you this.

Q Do some people have those things that did not have a concussion of the spinal cord?

A Oh, certainly.

MR. THOMAS: That is all.

REDIRECT EXAMINATION

BY MR. SPAULDING:

Q Doctor, in your nervous tests, that is to say, those tests you just described, the knee jerk and those other tests, were they positive for a mental condition or were they negative for a mental condition?

A Oh, they did not—I was not doing that for his mental condition.

Q Well, what did they show, then? What did they show you in the mental tests?

A The tests showed me the neurological condition of his nerves, not the condition of his mind.

Q That showed a nerve condition then, I take it?

A Oh, yes, they are corroborative of the condition of the nervous system and lesion of the spinal cord.

MR. SPAULDING: That is all, Doctor.

MR. THOMAS: That is all.

(Testimony of Dr. H. W. Orr)

DEFENDANT'S CASE

Deposition of

DR. H. W. ORR

was read in evidence in which he testified as follows:

My name is H. W. Orr. I reside in Lincoln Nebraska. I am a surgeon and a graduate of the University of Michigan of the year 1899. I specialized in orthopedic surgery and took post-graduate courses in Chicago with Dr. Ridlon; Belleview Hospital, New York; General Hospital, Boston, Massachusetts, and I visited clinics in London, Vienna and Italy. I have specialized in orthopedic surgery for thirty years. During the year 1920, I was a member of the Lincoln Clinic, Lincoln, Nebraska. The other members of the clinic were Dr. Hohlen and Dr. Coburn. Ronald Baxter was a patient at the clinic in 1920. At that time, I made a physical examination of him. I have no recollection and the records do not show whether X-ray pictures were taken or not but they probably were. He was given a general physical examination. Refreshing my memory from exhibits 1 and 2 which are photostats of a report containing my signature, Ronald Baxter at that time was suffering from a disability affecting particularly, the lower portion of the trunk and the back and what we call the lumbar and the Lumbo-Sacral region. As I remember it, Ronald Baxter was under observation or treatment about six or eight weeks from which my diagnosis was that he was suffering from a large scar he had in the region I referred to, caused by gunshot wounds inflicted during his military service. I probably saw Ronald Baxter on fifteen or twenty occasions during this

(Testimony of Dr. H. W. Orr)

period. I performed an operation on Ronald Baxter for the removal of the painful scar and for what we call the plastic repair of the area upon which the scar had to be removed. It was this tender, painful scar in this region of the back of which he complained when he came to my office for treatment. That was the only complaint he made as I remember it. I examined Ronald Baxter some time after the operation and found that he had been relieved of a considerable amount of pain and that he had less disability as a result of the removal of the painful scar. At that time, I did not make a formal prognosis but I was of the opinion that he would continue to improve. At that time I was acting in my special capacity with the Veterans Bureau as an Attending Specialist. Under the definition of total and permanent disability, I am of the opinion that he was not so disabled.

CROSS EXAMINATION

The doctor testified:

I have no history of the patient from the date of his injury to the date of my examination, that I now remember. I do not know the history of the patient's disability from the date of my examination to the present date. I have not seen the patient since 1920. I know nothing of the circumstances surrounding the injury other than he gave me a history of having had a gunshot wound in the lower portion of the back. The scar was several inches across in each direction, partially adherent to the bony structure of the lower portion of the back and over a portion of the ilium. The scar was somewhat tender and painful. As near as I can remember, there was no injury to the spinal column. I have no information concerning

(Testimony of Dr. Miles J. Breuer)
the patient's vocational history from the date of his injury to the date of my examination nor from the date of my examination to the present time. I do not know the plaintiff's educational qualifications. I do not know the plaintiff's occupation prior to his injury. I do not know whether or not the plaintiff's ability to readjust himself to his injury would have any bearing on his ability to follow continuously a substantially gainful occupation. I cannot say whether or not the plaintiff's mental qualifications would enter into the question of his ability to follow an occupation. I do not know whether the plaintiff was following an occupation at the time of my examination. At the time I examined him he was having an amount of pain and disability that might have interfered with many kinds of employment.

Deposition of

DR. MILES J. BREUER

was then read in evidence in which the doctor testified as follows:

My name is Miles J. Breuer. I reside in Lincoln, Nebraska, and am a licensed physician; have been such for fifteen years and I am a graduate of Rush Medical College. I have taken post-graduate courses in nervous and mental diseases in Washington University Medical School; internal medicine and diagnosis at the University of Pennsylvania Post Graduate Medical School; and the yearly clinic courses of the Medical College of Physicians every year at a different city each year. My practice is practically limited to diagnosis and internal medicine. In 1919, I was Acting Assistant Surgeon of the United

(Testimony of Dr. Miles J. Breuer)

States Public Health Service taking care of War Risk compensation work at which time I became acquainted with Ronald Baxter. I saw him frequently in my official capacity during the years 1919 and 1920, maybe a dozen times during that period. During that time I made several physical examinations of Ronald Baxter which consisted first of a series of questions; second, an inspection of the body; third, palpation of the body; fourth, laboratory tests; fifth, use of the stethoscope, blood pressure apparatus and other accessory instruments. I also framed the history of his complaints which he states to be a gunshot wound in the sacro region and left wrist; second, stomach complaint, developed in camp Dodge, just before he was discharged. I noticed in my examination, a large scar due to an H. E. wound in the sacro region, a scar on his wrist, a decrease in weight and general physical vigor, and an unstable condition of the nervous system. I sent him to Dr. Orr for the gunshot wound; for the stomach and nervous condition, I advised diet, rest, and medicine. Bearing in mind the definition of total and permanent disability, I am of the opinion that Ronald Baxter was not totally and permanently disabled.

On

CROSS-EXAMINATION

Dr. Breuer testified:

It is not possible for me to state all the complaints because my records were handed in to my successor in the Veterans' work and all I have to go by is my memory and exhibit 3. From these I can say that the complaint he made was a pain in the sacro region whenever he put any

(Testimony of Dr. Miles J. Breuer)

strain on his back and pain in the stomach. My prognosis of his condition was somewhat doubtful as to complete cure, but was good for relief with proper treatment. At that time he was probably unable to follow continuously any gainful occupation but it was my idea that with proper care, he would be put into shape so that he could. The plaintiff was not physically and mentally feasible for vocational training on June 22, 1920, because of the pain in his back and inability to be on his feet sufficiently because of the pain in his stomach and the necessity for restricted diet and rest and the necessity for orthopedic treatment for his back. It is my opinion that the spinal column is an important part of the human anatomy.

On

REDIRECT EXAMINATION

the doctor testified:

From my observation of this man, it appeared to me that he was one of those constitutionally sub-normal people who are not quite fully equipped to fight life's battles independently and who are always looking for opportunities to get outside assistance in their problems and needs. I am of the opinion that he was not totally and permanently disabled at the time of my last examination.

On stipulation of parties, (Government's Exhibit A), a Report of Physical Examination of Enlisted Men Prior to Separation from Service was admitted in evidence with the same force as if the doctor making the examination had testified to it. This report showed that the soldier, Ronald Baxter, claimed disability because of gunshot wound in spine and left hand incurred October 22, 1918,

(Testimony of Dr. Miles J. Breuer)

in the Argonne. Certificate of the examination states that soldier named had been given a careful physical examination. He has a wound consisting of gunshot wound—shrapnel, scar 10 inches long oblique, through lower Lumbar and Sacral region; superficial scar posterior surface of left wrist. The wound or injury is likely to result in death or disability. In line of duty. Disability 30%. Maximum improvement attained.

The Board of Review makes the same finding.

On stipulation of the parties, a statement of Dr. William G. Bouse was submitted in evidence with the understanding that if the doctor were present, he would testify as recited in the statement. This statement recites:

My full name is William G. Bouse. I am a physician residing at Goff, Kansas. I am a graduate of the Kansas Medical College, Topeka, Kansas, Department of Washburn University. I have practiced my profession twenty-four years. I have not specialized except in orthopedic surgery in the United States Army. I signed the Report of Physical Examination dated April 7, 1919, of Ronald Baxter, at which time I examined him. Refreshing my memory from the report of that examination, I am of the opinion that Mr. Baxter was not totally and permanently disabled at that time but was 30% disabled as stated on the report. If Mr. Baxter had proper education, he could do office work. With no education, he could operate an elevator or any other occupation requiring light physical effort. I made no other examinations other than the one dated April 7, 1919.

On stipulation of the parties, report of examination made by Dr. T. M. Leahy, April 21, 1922, was introduced into evidence with the understanding that the doctor would so testify if present.

(Testimony of Dr. T. M. Leahy)

DR. T. M. LEAHY

I made a physical examination of Ronald Baxter which reveals a well developed white male whose vision is normal and pupils re-act to light and accommodation. Hearing is normal. Nose and throat negative. Teeth in good condition. Chest normal in shape, heart negative. Lungs are clear and resonant on percussion. Rough breathing in the area of the large bronchi. No rales. A large scar on the left lumbar region which is adherent. Abdomen negative. No hernia, no varicosities nor ankylosis or deformity. No flat feet. Reflexes normal. Present diagnosis, gunshot wound of back and acute bronchitis. Prognosis of present condition, favorable. Training, feasible. Based on this report, it was stipulated that Dr. Leahy would testify:

My name is Thomas Maurice Leahy. I am a graduate of the University of Illinois Medical College and now live at the National Home. I have practiced my profession nineteen years. I have specialized in tuberculosis two years. Refreshing my memory from my report, I am of the opinion that Ronald Baxter is not permanently and totally disabled. Vocational training was feasible for him at that time which training he was then taking. He could follow any occupation not requiring hard and prolonged physical strain. His general condition was good and he was not otherwise suffering from any serious disability. I do not remember whether or not the patient was under my observation at other times. It would be necessary to refer to records of Chicago District Office U. S. V. B.

(Testimony of Dr. T. J. Dwyer—J. H. Rock)

A statement of

DR. T. J. DWYER,

of Omaha, Nebraska, furnished to the Veterans Bureau by Mr. Baxter on July 5, 1919, was then offered in evidence by the defendant. This statement recited that Dr. Dwyer today examined Ronald Baxter who resides in Omaha, Nebraska. He has a deep scar across the lower lumbar and sacral region as a result of a wound received from a piece of shell in the Argonne. The X-ray shows some bony destruction but not enough to cause any great loss of function. The scar is broad and deep which demonstrates that there is a considerable loss of soft tissue which consists of broad layers of heavy muscle. Mr. Baxter claims to be considerably disabled in occupation which requires constant use of the muscles of his back. From examination, I believe his claims are well founded. I would estimate the disability to be from 25 to 35% for any occupation that would require the active and constant use of the muscles of the back.

J. H. ROCK,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

My name is J. H. Rock. I am a physician and surgeon and a graduate of the State University of Iowa Medical College. I have practiced in Los Angeles for five years. I am now employed at the Soldiers' Home in Sawtelle, that is, the hospital adjacent to the Home, furnished for the use of the soldiers from the home that need hospital attention. For a time I had charge of the work in con-

(Testimony of J. H. Rock)

nection with bone injuries. During that time, I examined Ronald Baxter. I have X-rays that were made of him previous to the time that I took charge of the work. I examined him in 1928 and the X-rays were made in 1926. I cannot tell from the X-ray where the injury occurred as there is nothing there to show. From examining the man, I know the location of the injury covers these particular vertebrae (indicating on X-ray). There is nothing on the X-ray that shows a scar on the bone.

Q In your examination of the man did you examine him further than by taking X-rays, as to whether there was any injury to the spinal cord or not?

A Why, he had a complete physical examination, if that is what you mean.

Q Yes. And did that examination cover such things as would determine if his spinal cord had been injured by that scar?

A Yes, sir.

Q Or not?

A Yes, sir.

Q In what manner was that tested, Doctor?

A Do you mean for injury to his spinal cord?

Q Yes.

A Well, it comes under the head of reflexes, his reactions, nervous reactions to various impulses.

Q Was there a complete examination made in that regard?

A Yes.

Q Did that examination show that there was any injury to the spinal cord?

(Testimony of J. H. Rock)

A Yes, sir.

Q Did it show there was anything abnormal in the man as far as that scar or the wound that caused that scar was concerned, outside of the scar itself?

A I don't exactly understand what you mean.

Q Aside from the scar, the wound at the left there where you can see the result of the wound—

A Oh, yes.

Q —did it result in any constitutional injury to the man, such as injury to the back bone or the spinal cord?

A There is some damage to the movements of his back and some restriction of the motion, of course, due to the—

Q What caused that damage, Doctor?

A Well, this injury no doubt involved the bone, and in healing, these tissues healed in spots, in various places to the underlying bone, and that caused a replacement of the elastic structures of his back by some scar tissue; and in that way it limits the range. What I mean, instead of his back going completely forward, it is slightly restricted, the limits of his motion. The same way, applied to the backward motion, or from side to side, he has some degree of limitation of motion.

Q He can't move quite so far as he could move before it happened?

A No.

Q Is that restriction a major handicap, as distinguished from simply a minor effect, loss of motion?

MR. SPAULDING: I submit, if the Court please, the foundation is not sufficiently laid to show that.

THE COURT: Objection sustained to the question as asked in the language used. The doctor can describe what

(Testimony of J. H. Rock)
the effect would be, that is, to what proportion of the full, free movement the man would have, if he can describe it to the jury that way.

Q BY MR. THOMAS: What proportion—

Q BY THE COURT: May I ask you, Doctor, is that restriction due to the external injury, that is, is it external or is it against the bone?

A I testified that this tissue overlying the bone has healed to the bone.

THE COURT: I see.

A (Continuing.) As a matter of adhesion.

Q What is the degree of movement, that is, what is the diminution of movement? Describe it that way to the jury.

A Well, that is a relative matter always in estimating the motion of a man's spine.

Q If he has bent over forward as far as he can go, in this man's case, can you tell?

A I can't tell by inches or degrees how much he is restricted.

Q Nor proportion?

A Well, it is a matter of memory, how much he can move. That is three years, but, as I recall, he did not have a great restriction.

THE COURT: Proceed.

MR. THOMAS: That last question, I did not get the last answer to it.

A JUROR: I did not get the answer, either.

Q BY MR. THOMAS: What do you recall the amount of restriction to be?

A As not a great amount of restriction.

I am of the opinion that this man is not totally and permanently disabled. My opinion is that the man's disability will not improve or get worse. It is stationary in its present stage. I think the only limitation on his work is that he cannot do heavy work.

(Testimony of J. H. Rock)

On

CROSS EXAMINATION,

Dr. Rock testified:

BY MR. SPAULDING:

Q Doctor, handing you what purports to be the medical examination, I will ask you if that is your signature?

A Right.

Q Now, I call your attention to the fact that at the time of your examination you made notations of these various things in your examination report: That he had a "general run-down condition; no pep; weak; work or exercise for an hour required three hours to get over it."

A Excuse me.

Q Required three hours rest to get back on his feet, not exactly in those words. What did you say?

A What did you say at the start?

Q These are apparently statements under the heading of "Present Complaint," and form a part of your Examination Report at the time of your examination.

A Yes, but you understand—

Q I understand what they are, but you made a notation of them, and I will ask you how you explain them when I get through reading them. That is: "General run-down condition; no pep; weak; work or exercise for an hour requires three hours to get over it. Weakness appears to be more in the back and hips; does not rest well at night. Appetite is poor. Pain in lumbar region all the time; this is increased on exercise or being on feet. Also has pain in left leg from being on feet. Has weakness of left hand. Has sharp, daring pains in left side of face. These come and go." Doctor, how do you explain those?

A Patient's statement.

Q True, but isn't a part of your examination, every examination, a part of the complaints made to you; that

(Testimony of J. H. Rock)
is why a patient goes to a doctor, because he notices things the matter with him, isn't that true?

A Yes.

Q That is a very material part of your examination, isn't that so?

A Yes, sir.

Q How do you explain this, Doctor, if they are true?

A I can't explain his statement.

Q Did you make any effort to explain those complaints, as made?

A Why, we examined him.

Q What did you do besides looking at his back?

A Well, the usual procedure of a general physical examination.

Q Just what was it?

A Inspection, that means to look it over.

Q Give him a mental examination, Doctor?

A Sir?

Q Did you give him a mental examination?

A No, sir.

Q You did not. And, isn't it true, Doctor, that the spinal cord has a very close connection with the brain?

A But not mental.

Q Your brain is where your mental abilities or functions come from, isn't it?

A That is right.

Q So then, there is a close connection between the spinal cord and the brain, isn't that true?

A Yes, sir.

Q And you find with those complaints that those complaints are complaints which may be due to a nervous condition or to a nerve injury, aren't they? You expect those kind of complaints from a nerve injury, don't you, pains in the side of the face?

A They are not unusual.

(Testimony of J. H. Rock)

Q Beg pardon?

A They are not unusual. You don't expect them.

Q Still then, you did not make any examinations from a real psychiatric viewpoint to find whether there was something more fundamental there than the spinal scar which you saw, isn't that true?

A He was examined so far as reflexes, and so forth.

Q It does not so show, does it, Doctor?

A Well, he had been examined. That is my report, mostly the orthopedic side or standpoint. A lot of things are shown that are not a matter of record on that paper, when they were done.

Q Now, Doctor, do you or do you not agree with this proposition: That after all, injuries or disabilities affect individuals according to the individual's ability to overcome them, or according to his stamina or his general mental and physical background; that is to say, an injury to one individual might react entirely different upon another individual, isn't that true?

A Yes, sir.

Q So then, we have here, Doctor, an injury, isn't that true?

A Right.

Q And you can't tell positively just what the effect of that injury is going to be on him, can you?

A Well, in certain ways you can; in certain ways you can't.

Q Well, just how can you and how can't you?

A You can tell what degree of impairment it places on him in a physical way.

Q But you can't tell mentally, can you?

A No.

MR. SPAULDING: That is all, Doctor.

MR. THOMAS: That is all, Doctor.

(Testimony of Arthur J. Cassidy)

MR. SPAULDING: I will offer this report in evidence as plaintiff's exhibit.

(Plaintiff's Exhibit 1.)

ARTHUR J. CASSIDY

was then called on behalf of the defendant, and after being first duly sworn, testified as follows:

My name is Arthur J. Cassidy. I work in the Personnel Office of the Soldiers' Home at Sawtelle. I have charge of the records that have been made in the present year including the records of the personnel now on duty. I have, in such capacity, the records of Ronald Baxter showing his employment at the Soldiers' Home. The records show that he was first employed October 8, 1924, as a janitor in which position he worked until December 7, 1924, two months. He was again employed on February 6, 1925, and remained until May 14, 1925, three months and nine days as a janitor. He was next employed August 1, 1925, until November 30, 1925, as a janitor. He was next employed January 24, 1927, to March 31, 1927, as a janitor, when he was promoted to a company sergeant on April 1, 1927, in which position he remained until July 15, 1927. He was then off for forty-five days and returned to work September 1, 1927, as a janitor, and worked continuously until October 31, 1930, approximately three years and two months. He next went to work November 26, 1930, and continued to work until the present time missing only twenty-six days between the two employments. When he returned to work, it was again as a sergeant which position he still occupies. His pay as a janitor in 1924 was at the rate of $25.00 a month; 1925, at $24.00 a month; 1927, at $24.00 a month to the time of his promotion as a sergeant on April 1st. His pay was increased to $28.00 a month. When he resumed his work in September, 1927, as a janitor, it was at the rate of

(Testimony of E. B. Newcomb)

$24.00 a month. He came back to work in September, 1927, at the rate of $24.00 a month up to March 1, 1929, when his pay was raised to $35.00 a month at which it remained until October 31, 1930. His present position commencing November 26, 1930, was at the rate of $40.00 a month which he is still receiving. These positions are positions inside the home and are given only to inmates of the home.

E. B. NEWCOMB

was then called as a witness on behalf of the defendant, and testified as follows:

My name is E. B. Newcomb. I reside at the National Home, Sawtelle, where I am employed as Quartermaster. As such Quartermaster, I know the duties of a janitor. The duties of a janitor are cleaning mostly, and running errands. It might, incidentally, include the running of an elevator as each building in the Soldiers' Home has an elevator that has to be run by the personnel of the building. The duties of a sergeant are more or less administrative, watching linens, seeing that the janitors do their duty, enforcing discipline in the company, and assisting the company sergeant in his administrative duties.

On

CROSS EXAMINATION

Captain Newcomb testified:

We try to pick the better type of man to appoint to the position of sergeant.

Defendant rests. Plaintiff rests.

MR. THOMAS: I make a motion for a directed verdict.

THE COURT: Let the record show the motion. Motion denied, exception allowed. Proceed with the argument.

Dated: April....., 1932.

SAMUEL W. McNABB,
United States Attorney,
Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney,
H C Veit
H. C. VEIT,
Of Counsel.

IT IS HEREBY STIPULATED by and between the parties in the above entitled action that the foregoing is a full, true and correct Bill of Exceptions of the proceedings had in the above entitled action and contains all matters submitted to the court on the trial of the said actior and that the same may be certified by the court as such.

Dated: April 22, 1932.

David Spaulding
DAVID SPAULDING,
Attorney for Plaintiff,
SAMUEL W. McNABB,
United States Attorney,
Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney,
H. C. Veit
H. C. VEIT, Of Counsel,
Attorneys for Defendant.

The proposed Bill of Exceptions was lodged with the Clerk on the.....day of May, 1932, within the time allowed for filing the Bill of Exceptions, by orders of the United States District Court for the Southern District of California, Central Division, dated November 27, 1931 extending the time within which to file the Bill of Exceptions to February 17, 1932, and the order of February 12 1932, further extending the time to April 1, 1932, and the order of March 30, 1932, further extending the time to April 23, 1932, and the order of April 23, 1932, further extending the time to May 31, 1932, all orders having been made at the February term of said court, and extensions thereof. The attorney for the plaintiff filed his amendments to said proposed Bill of Exceptions within ten days thereafter. The bill was settled by the court on the 7 day of May, 1932, and the amendments allowed by the court have been inserted in the foregoing Bill of Exceptions, which bill is in all respects correct, and containing all of the evidence, and is hereby approved, allowed, and settled and made a part of the record herein.

DATED this 7 day of May, 1932.

Wm P James
United States District Judge.

[Endorsed]: No. 3569-J In the District Court of the United States for the Southern District of California Central Division Ronald Baxter, Plaintiff, vs. United States of America, Defendant. Defendant's Engrossed Bill of Exceptions. Filed May 7-1932 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM

On Motion of Samuel W. McNabb, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and good cause appearing therefor;

IT IS ORDERED that the time within which the Defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including February 17, 1932.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including February 17, 1932.

DATED: November 27, 1931.

Wm. P. James
UNITED STATES DISTRICT JUDGE.

[Endorsed]: No. 3569-J In the District Court of the United States for the Southern District of California Central Division Ronald Baxter, Plaintiff, vs. United States of America, Defendant. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term. Filed Nov 27 1931 R. S. Zimmerman, Clerk By Thomas Madden, Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM.

On motion of Samuel W. McNabb, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and good cause appearing therefor;

IT IS ORDERED that the time within which the Defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including April 1, 1932.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including April 1, 1932.

DATED: February 12, 1932.

Wm P James
United States District Judge.

[Endorsed]: No. 3569-J United States District Court Southern District of California Central Division Ronald Baxter vs. United States of America Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term Filed Feb 12 1932 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM.

On motion of Samuel W. McNabb, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and good cause appearing therefor;

IT IS ORDERED that the time within which the Defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including April 23, 1932.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the Term in which the Judgment herein was entered, the Term of this Court is hereby extended to and including April 23, 1932.

Dated: this 30 day of March, 1932.

Wm P James
United States District Judge.

[Endorsed]: No. 3569-J In the District Court of the United States for the Southern Dist. of California Central Division Ronald Baxter, Plaintiff, vs. United States of America, Defendant. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term. Filed Mar 30 1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER EXTENDING TIME WITHIN WHICH TO SERVE AND FILE BILL OF EXCEPTIONS AND EXTENDING TERM.

On motion of Samuel W. McNabb, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, and good cause appearing therefor;

IT IS ORDERED that the time within which the defendant herein may serve and file its proposed Bill of Exceptions herein is hereby extended to and including May 31, 1932.

IT IS FURTHER ORDERED that for the purpose of making and filing Bill of Exceptions herein, and the making of any and all motions necessary to be made within the

Term in which the Judgment herein was entered, the Term of this this Court is hereby extended to and including May 31, 1932.

DATED: April 23, 1932

Hollzer
Judge

[Endorsed]: No. 3569-J In the District Court of the United States for the So. District of California Central Ronald Baxter vs. United States of America. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term Filed Apr 23 1932 R. S. Zimmerman, Clerk By C. A. Simmons, Deputy Clerk

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	PETITION
	)	FOR
	)	APPEAL
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA:

COMES NOW the defendant, United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, Clyde Thomas,

Assistant United States Attorney for said District, with H. C. Veit, and Madison L. Hill, U. S. Veterans Administration, of counsel, and feeling itself aggrieved by the Judgment entered in this cause, August 1, 1931, and the order denying a new trial entered November 17, 1931, hereby prays that an appeal may be allowed from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, petitioners hereby present its Assignment of Errors.

Dated: February 11, 1932.

SAMUEL W. McNABB,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney.

H. C. Veit
H. C. VEIT,
Madison L. Hill
MADISON L. HILL,
Of Counsel.

[Endorsed]: No. 3569-J In the District Court of the United States for the So. District of California Central Ronald Baxter vs. United States of America. Petition for Appeal Filed Feb 12 1932 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	No. 3569-J ASSIGNMENT OF ERRORS

The defendant, United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, and Clyde Thomas, Assistant United States Attorney for said District, with H. C. Veit and Madison L. Hill, United States Veterans Administration, of counsel, in connection with the Petition for Appeal, files the following Assignment of Errors upon which it will rely upon its prosecution of the appeal in this cause from the Judgment entered herein on August 1, 1931, and the order denying a new trial entered on the 17th day of November, 1931.

I.

That the Court erred in refusing to direct a verdict for the defendant in that the testimony adduced by the plaintiff on the trial was incompetent and irrelevant and not within the issues to be tried and was insufficient to support a verdict for the plaintiff.

II.

That the Court erred in not sustaining defendant's objection to the introduction of testimony which was immaterial and irrelevant and not within the issues to be tried.

III.

That the Court erred in not sustaining defendant's objection to incompetent and irrelevant testimony and not within the issues to be tried in that by the Court's ruling, plaintiff was permitted to submit testimony at variance with the allegations of his complaint.

IV.

That the Court erred in not sustaining defendant's objection to the introduction of incompetent and irrelevant testimony and not within the issues to be tried in that the defendant was taken by surprise and was not prepared to submit testimony in rebuttal thereto.

V.

That the Court erred in denying the motion of defendant for a directed verdict for the defendant on the ground that the preponderance of evidence failed to show a permanent and total disability of the plaintiff.

VI.

That the Court erred in denying the motion of the defendant for a directed verdict in favor of the defendant on the ground that the plaintiff had not sustained the burden of proof and established facts which would justify a judgment being returned in his favor.

VII.

That the Court erred in denying the motion of the defendant for a directed verdict in that the proof adduced by the plaintiff did not prove or tend to establish the cause of action set out in plaintiff's complaint.

VIII.

That the Court erred in denying the motion of defendant for a directed verdict in that the evidence adduced clearly showed that the plaintiff herein was not permanently and totally disabled from following continuously any substantially gainful occupation while the policy of war risk insurance sued upon was in force and effect, but said evidence by a preponderance thereof clearly showed that the plaintiff's disabilities were not total.

IX.

That errors of law occurred in the trial of said cause in that the verdict was contrary to law.

WHEREFORE, defendant demands that the judgment entered herein be reversed and that the District Court for the Southern District of California, Central Division, be ordered to enter its judgment in favor of the defendant, United States of America.

SAMUEL W. McNABB,
United States Attorney,

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney,

H. C. Veit
H. C. VEIT,
Madison L. Hill
MADISON L. HILL,
Of Counsel.

[Endorsed]: No. 3569-J In the District Court of the United States for the So. District of California Central Ronald Baxter vs. United States of America Assignment of Errors Filed Feb 12 1932 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	No. 3569-J
Plaintiff,	)	ORDER
	)	ALLOWING
vs.	)	APPEAL
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

IT IS HEREBY ORDERED that the appeal prayed for in the Petition for Appeal filed in the above entitled cause be allowed.

Dated: February 12, 1932.

Wm P James
United States District Judge

[Endorsed]: No. 3569-J In the District Court of the United States for the So. District of California Central Ronald Baxter vs. United States of America. Order Allowing Appeal Filed Feb 12 1932 R. S. Zimmerman, Clerk By B B Hansen Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	No. 3569-J
Plaintiff,	)	PRAECIPE
	)	FOR
vs.	)	TRANSCRIPT
	)	OF RECORD.
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

TO THE CLERK OF THE ABOVE COURT:

You are hereby requested to make a Transcript of the Record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such Transcript of Record the following, and no other papers and exhibits, to-wit:

1. Complaint
2. Answer
3. Judgment
4. Motion for New Trial
5. Affidavit of Frank L. Long
6. Affidavit of Guy R. White
7. Minute Order of November 17, 1931
8. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated November 27, 1931.
9. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated February 12, 1932.

10. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated March 30, 1932.
11. Order Extending Time Within Which to Serve and File Bill of Exceptions and Extending Term, dated April 23, 1932.
12. Bill of Exceptions

12a Pltfs Ex #1

13. Appeal papers, consisting of:
    - A. Petition for Appeal
    - B. Order Allowing Appeal
    - C. Assignment of Errors
    - D. Praecipe for Transcript of Record
    - E. Citation on Appeal
    - F. Clerk's certificate to record

Said Transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, on or before the 31st day of May, 1932.

DATED: May 7th, 1932.

SAMUEL W. McNABB,
United States Attorney

Clyde Thomas
CLYDE THOMAS,
Assistant United States Attorney

H C Veit
H. C. VEIT,
Madison L. Hill
MADISON L. HILL, of Counsel
ATTORNEYS FOR DEFENDANT.

Service of the above Praecipe accepted and acknowledged this 7th day of May, 1932.

David Spaulding D H
ATTORNEY FOR PLAINTIFF.

[Endorsed]: No. 3569-J In the District Court of the United States for the Southern District of California Central Division Ronald Baxter, Plaintiff, vs. United States of America, Defendant. Praecipe for Transcript of Record. Filed May 7-1932 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

RONALD BAXTER,	)	
	)	
Plaintiff,	)	
	)	No. 3569-J
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 78 pages, numbered from 1 to 78 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; verdict; judgment; motion for new trial with affidavits of Guy R. White and Frank L. Long attached; minute order denying motion for a new trial; bill of exceptions; plaintiff's exhibit Number 1; orders extending time to file bill of exceptions and orders extending term of court; petition for appeal; assignment of errors; order allowing appeal and praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6859.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Ronald Baxter,
Appellee.

BRIEF OF APPELLANT.

SAMUEL W. MCNABB,
United States Attorney,

CLYDE THOMAS,
Assistant United States Attorney.

H. C. VEIT,
Regional Attorney U. S. V. B.,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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AUTHORITIES CITED.

No. 6859.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellant,

vs.

Ronald Baxter,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

Plaintiff sued and was given judgment on a War Risk Insurance contract. From this judgment defendant, United States of America, has appealed.

According to the evidence plaintiff received a shrapnel wound during the world war in the lower lumbar and ilium region. That as a result of this wound many of the heavy muscles of the back were removed but that otherwise it was completely healed. The Veterans' Bureau rated the plaintiff 30% disabled for compensation purposes.

Plaintiff testified that after his discharge from the Army he attempted to do certain work requiring the handling of heavy boxes which he was unable to do be-

cause of the weakened condition of his back. He also had a job as night watchman for a short time. He then went into vocational training under the Veterans' Bureau where he took a course in agriculture for two semesters and then was given a music course for two or three years. After this he was given further training in a business course and a salesmanship course.

He then testified that he did not give the progress the Bureau required and was taken out of training for that reason. Further that he was extremely nervous.

In 1924 he entered the Soldiers Home at Sawtelle, California, where he has lived, with the exception of short intervals, ever since. Right after going to the Soldiers Home he went to work as an elevator operator, for which he received $24.00 per month in addition to the board and room ordinarily supplied to the inmates. With the exception of short intervals he was so employed, with two or three increases in pay, until at the time of the suit he was employed as a sergeant for which he received the sum of $40.00 per month.

Plaintiff's only expert testimony was a doctor who qualified as a specialist in mental and nervous diseases, specifically stating that he was not a bone specialist. He testified that in his opinion the plaintiff was totally and permanently disabled because the concussion of the shrapnel wound in plaintiff's back had caused a disturbance in the spinal cord of the plaintiff which made him so nervous he could not work, but that any work he could do would be beneficial.

Defendant's case consisted of medical testimony that plaintiff was injured, as heretofore stated, but that the

injury, while permanent, was not total and that the plaintiff was perfectly able to do any work which did not require heavy exertion of the back muscles.

Defendant then established that plaintiff was employed at the Soldiers Home from October 8, 1924, with the exception of short intervals, until the time of trial and still is so employed; that his pay began at $24.00 per month and was increased at various times until the time of his trial he was receiving $40.00 per month in addition to the usual board, room, etc. supplied to the inmates of the Home.

Plaintiff's complaint alleged plaintiff to be permanently and totally disabled by reason of the shrapnel wound in the back, loss of bone structure from the back at the ilium and fracture of the fourth lumbar vertebrae. This was denied by defendant.

On the offer of evidence as to mental and nervous diseases defendant objected, its objection was overruled and exception allowed. [Tr. p. 29.]

The admission of this evidence in an attempt to establish a mental disability, whereas the complaint only set out a physical disability, is one of the points appellant relies on as a cause for granting a new trial.

The other and more important point is that plaintiff failed to establish total disability in that an actual work record even of a part time job, such as was performed in the Soldiers Home, defeats the proof of total disability.

At the close of the testimony defendant moved for a directed verdict, which motion was denied and exception noted. [Tr. p. 63.]

Specification of the Errors Relied Upon.

I.

That the court erred in refusing to direct a verdict for the defendant in that the testimony adduced by the plaintiff on the trial was incompetent and irrelevant and not within the issues to be tried and was insufficient to support a verdict for the plaintiff. [Tr. p. 72.]

The irrelevant and incompetent testimony referred to in this specification of errors is that adduced by the plaintiff through Dr. Orbison. [Tr. pp. 25 to 46, incl.]

This evidence is to the effect that Dr. Orbison is a mental and nervous disease specialist. He testified that he examined the wound on the back of the plaintiff, that he was not a bone specialist, did not have an X-ray picture of the wound, and in fact knew very little about it except what he had been told by the plaintiff. He, however, testified that he believed plaintiff to be totally and permanently disabled because of certain mental and nervous tests and examinations that he gave the plaintiff and that in his opinion these were caused by a disturbance in the spinal cord caused by the concussion of the piece of shrapnel which struck plaintiff in the back. The condition, according to the doctor, which caused total disability was entirely mental and nervous and not physical. The exception of the defendant is as to such evidence of nervous and mental disability whereas the injury alleged in the complaint was the physical injury of a shrapnel wound.

II.

That the court erred in not sustaining defendant's objection to the introduction of testimony which was imma-

terial and irrelevant and not within the issues to be tried. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

III.

That the court erred in not sustaining defendant's objection to incompetent and irrelevant testimony and not within the issues to be tried in that by the court's ruling, plaintiff was permitted to submit testimony at variance with the allegations of his complaint. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

IV.

That the court erred in not sustaining defendant's objection to the introduction of incompetent and irrelevant testimony and not within the issues to be tried in that the defendant was taken by surprise and was not prepared to submit testimony in rebuttal thereto. [Tr. p. 73.]

This specification of error refers to the same evidence set out under specification number I.

V.

That the court erred in denying the motion of defendant for a directed verdict for the defendant on the ground that the preponderance of evidence failed to show a permanent and total disability of the plaintiff. [Tr. p. 73.]

This specification is based on the fact that the evidence is undisputed that plaintiff had actually worked at a substantially gainful occupation almost continuously since October 8, 1924, a period of about eight years.

VI.

That the court erred in denying the motion of the defendant for a directed verdict in favor of the defendant on the ground that the plaintiff had not sustained the burden of proof and established facts which would justify a judgment being returned in his favor. [Tr. p. 73.]

This specification is based on the same evidence set out under specification number V.

VII.

That the court erred in denying the motion of the defendant for a directed verdict in that the proof adduced by the plaintiff did not prove or tend to establish the cause of action set out in plaintiff's complaint. [Tr. p. 73.]

This specification is based on the same evidence set out under specification number V.

VIII.

That the court erred in denying the motion of defendant for a directed verdict in that the evidence adduced clearly showed that the plaintiff herein was not permanently and totally disabled from following continuously any substantially gainful occupation while the policy of war risk insurance sued upon was in force and effect, but said evidence by a preponderance thereof clearly showed that the plaintiff's disabilities were not total. [Tr. p. 74.]

This specification is based on the same evidence set out under specification number V.

IX.

That errors of law occurred in the trial of said cause in that the verdict was contrary to law. [Tr. p. 74.]

ARGUMENT.

As will be noted in the assignments of error, they are naturally grouped in two propositions. The first four assignments of error refer to the fact that plaintiff was allowed to prove a mental disability whereas his complaint only alleged a physical injury. The second group, assignments of error V to IX, inclusive, is based on the fact that the evidence, including that claimed to have been admitted improperly, did not establish a total and permanent disability in the plaintiff. The first group will be argued first and treated together as one proposition.

Plaintiff's Complaint Alleged Total Physical Disability Whereas Proof Did Not Tend to Establish a Total Disability Except Doctors Testimony That Plaintiff Was Totally Disabled Because of His Nervous Condition.

Plaintiff's complaint alleged that plaintiff received, while in the American Army, certain disabilities, to-wit: "Gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, fracture of the fourth lumbar vertebrae." [Tr. p. 4.] He then alleges "That by reason of the foregoing plaintiff was discharged, as aforesaid, totally and permanently disabled from gunshot wound in left wrist, shrapnel wound in lumbar region of back, loss of bone structure from back at the ilium, and fracture of the fourth lumbar vertebrae, * * *."

Plaintiff established such injuries and a rating by the Veterans' Bureau of a disability of 30%. [Tr. p. 18.] Plaintiff made no pretext of establishing material physi-

cal injury except the loss of muscles of the back, resulting in a weakening of such parts of the body. Plaintiff claimed to have had pains in his shoulders and the back of his head at all times and that he formerly used a brace to hold up his body but had dispensed with it. [Tr. pp. 20 and 21.]

Plaintiff offered no medical or expert testimony of any kind whatever that the physical injuries caused by any of the wounds received resulted in a total disability. In fact it was obvious from the evidence that the back injury was the only one material and, while permanent, was in no wise in itself total. Plaintiff then, in an effort to establish total disability, relied on Dr. Orbison, a specialist in mental and nervous diseases. [Tr. pp. 25 to 46, incl.]

Appellant claims this testimony was improperly admitted because:

First: It was not within the issues;

Second: It was a surprise to the appellant, which it was not prepared to try.

Pleadings Allege a Physical Disability Only.

Obviously medical testimony prepared by the defendant to meet a claim of physical disability is entirely different and distinct from what would be prepared to meet a claim of mental disability. Plaintiff claims that an examination by a Government doctor showed that plaintiff complained of symptoms which would show a mental and nervous disability. I can find nothing that would justify such conclusion, but, even though it were so, it is submitted that such complaint to a Government doctor years

before the trial of the action would not support and take the place of a complaint alleging such disability. As a matter of fact it would tend to establish the opposite conclusion. If plaintiff had had a mental and nervous complaint and placed such claim before the Bureau and had then brought action and failed to set out such complaint, the reasonable conclusion to be drawn from such pleadings was that such claim had been abandoned and would not be urged on the trial of the action, thus the defendant is entitled to rely on such pleadings and to prepare its defense in accordance therewith. The only proper issues on which evidence should be received and submitted to the jury are those issues created by the pleadings.

> *Slocum v. New York Life Insurance Co.,* 228 U. S. 364, 33 Sup. Ct. Rep. 523.
>
> "* * * The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. * * *."
>
> *Tucker v. United States,* 151 U. S. 164, 14 Sup. Ct. Rep. 229.
>
> "Pleadings are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them."
>
> *The Divine Pastora,* 4 Wheat. 52.
>
> "Evidence varying from the facts alleged cannot be introduced."

The pleadings having put only the physical disability in issue, it was not proper to allow a mental or nervous disability to be established in order to sustain the complaint.

Garrett v. Louisville & Nashville R. R. Co., 235 U. S. 308. 35 Sup. Ct. Rep.

"Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point so that the parties may come prepared with their evidence and not be taken by surprise and the jury may not be misled by the introduction of various matters."

A judgment entered on an issue not within the pleadings is improper. The only total disability attempted to be proven for the plaintiff in this case was mental and nervous disability which was not made an issue by the pleadings. Judgment was therefore erroneous.

Reynolds v. Stockton, 140 U. S. 265, 268, 270. 11 Sup. Ct. Rep. 773.

"A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. * * *

"* * * In the case of Smith v. Ontario, 18 Blatchford, 454, 457, Circuit Judge Wallace observed, that 'the matter in issue' has been defined in a case of leading authority, as 'that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading.' King v. Chase, 15 N. H. 9. (41 Amer. Dec. 675.) But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings."

It follows that in the present case not only was improper evidence received but that an improper judgment was rendered for certainly a mental and nervous total and permanent disability was a different issue than the physical disability set out in plaintiff's complaint.

The Evidence Shows Without Dispute That Plaintiff Has Worked for a Long Period of Time and Was at the Time of the Trial Still Employed in a Substantially Gainful Occupation. The Law Is Well Established That Actual Occupation Is a Defense to a Claim of Total and Permanent Disability.

The evidence is not disputed that the plaintiff was employed at the Soldiers Home, Sawtelle, California, beginning on October 8, 1924, as a janitor. He worked in that position until December 7, 1924, a period of two months. He was again employed on August 1, 1925, until November 30, 1925, a period of four months. He was next employed January 24, 1927, to March 31, 1927, as a janitor, a period of two months, at which time he was promoted to company sergeant, in which position he remained until July 15, 1927, a period of three and one-half months. He was again employed as a janitor on September 1, 1927, and worked continuously until October 31, 1930, approximately three years, two months. He was then off for twenty-six days, returning to work on November 26, 1930. At the time of the trial, he was still employed in the same position. During this period, he was working as a sergeant. His pay as a janitor in 1924 was at the rate of $25.00 a month. When he returned to the Home in 1927, he started at $24.00 a month and when he was promoted to sergeant, he was

increased to $28.00 per month. When he next returned to the Home as a janitor, it was at the rate of $24.00 a month until March 1, 1929, when he was raised to $35.00 per month, at which rate it continued until November 26, 1930, when it was raised to $40.00 per month, which compensation he was still receiving at the time of the trial. Such compensation was, of course, in addition to the room and board furnished him as an inmate of the Soldiers Home. [Tr. pp. 61 and 62.]

It is submitted that a man who can work over so long a period and do his work in such a satisfactory manner as to have his compensation increased and be promoted to a more important position, is not in the contemplation of the War Risk Insurance Act totally disabled. This is further illustrated by the testimony of Captain Newcomb, quartermaster at the Soldiers Home at Sawtelle, who testified on cross-examination, that they tried to pick the better type of men to appoint to the position of sergeant. It seems too obvious to need to be stated that a man able to do the work and occupy the position of sergeant, who was the "better type of man," is totally disabled. There is no dispute in the case that the man is partially disabled from the loss of considerable muscle tissue from his back, and cannot do heavy work and, in fact, is rated as 30% disabled by the Veterans' Bureau. That this percentage of disability is permanent is not disputed. It is obvious that the muscle will not again develop or get strong enough to take the place of that which has been lost. It is just as obvious that such physical handicap is not a total disability within the meaning of the War Risk Insurance Act for there are many ordinary occu-

pations which a man without a strong back can perform. That plaintiff recognized this is shown by his belated effort to make the plaintiff's mental and nervous condition an issue in the trial. This is borne out by the fact that the only medical testimony was that of Dr. Thomas J. Orbison who qualified as a specialist in mental and nervous diseases. His testimony was too verbose and uncertain to attempt to make a concise statement of it. However, what he apparently attempted to say was that the concussion caused by the shrapnel which struck the plaintiff caused some disturbance in the spinal cord which resulted in the nervous and mental total disability of the plaintiff. He testified on cross-examination that he did not take any X-rays or had not seen any and that he had never seen the plaintiff except on July 2, 1931, shortly before the trial. [Tr. pp. 29 and 34.]

The doctor's ultimate conclusion is that he on the examination of the plaintiff, conducted certain tests which showed the plaintiff to be nervous. [Tr. pp. 25-46 incl.]

While defendant does not believe that the doctor's testimony is sufficiently definite and certain to establish that plaintiff is totally and permanently disabled even because of a nervous and mental condition or otherwise, it rests its position principally on the fact that the plaintiff, by the work record heretofore set out, is as a matter of law precluded from claiming total and permanent disability from the date claimed, that is, October 22, 1918, [Tr. p. 4], or while his War Risk insurance policy was in force and effect, up to and including July 1, 1919, on which date said policy lapsed. [Tr. p. 7.] That a work record

is a defense to total and permanent disability in such a case as the present one is well established by the following cases:

United States v. Seattle Title Trust Company, 53 Fed. (2d) 435, 437 (C. C. A. 9).

"In this case the fact is that he did work and there is no testimony to justify the conclusion that he was not able to work, that is, that he was not able to do what he did in fact do.

"* * * In the case at bar the evidence was insufficient to justify the verdict of the jury that appellee was totally and permanently disabled on or before February 28, 1919, and in so holding we again call attention to the distinction between a case involving syphilis, such as the case at bar, where ordinary physical work not involving mental strain is rather beneficial than otherwise to the person having such disease, and one in which the insured is suffering from a disease such as active tuberculosis, and wherein it is shown, although work is actually done, that it should not have been done by reason of the effect upon the health of the person so afflicted."

It will be noted that Dr. Orbison admitted on cross-examination that light work might be beneficial to the plaintiff and "that he ought to do just as much as he can physically." [Tr. pp. 38 and 39.]

United States v. John Bela Martin, 54 Fed. (2d) 554, 555-6 (C. C. A. 5).

"The court put the recovery there upon the ground that though he did work, the jury had a right to find he was not able to work, and that it was his working when he was totally disabled which short-

ened his life and brought about his death. If Martin had shown either that he had worked though he was really not able to work, or that though able to work he had worked at the sacrifice of his health, we should not have felt warranted in disturbing the jury's verdict. His evidence established quite the contrary. It does indeed show that he received a serious wound under circumstances highly creditable to him, and that he has a marked disability. That this quite seriously, in fact almost totally disabled him in 1918 when he received it, but that the disability rapidly lessened and from the time of his discharge, with slight intermission, he has gone about his work earning a living as a real estate operator, building contractor, and a trader in lands and leases. * * * His own evidence and that of his witnesses is that while the strength of his leg is impaired, and it is not as serviceable as the uninjured one, he could and did get about with the aid of a cane and by the use of an automobile sufficiently to carry on his business; that he can walk without a cane, and that in fact he does get about now mostly without a cane. He testified that though for a while after the injury the wound on his thigh would suppurate and burst, that it has not done so for a long time and that he has not consulted a doctor on account of it for five years. * * * The medical testimony, his own and that of the Government, was to the effect that his leg has permanently healed with a good union, and that while it will not get any better, it will not get any worse, and that the use of it will not injure it in any way except to cause fatigue.

Judgment for plaintiff reversed."

The present case is similar to this in that there is no claim that the physical injury will get any worse.

United States v. Fly, 58 Fed. (2d) 217, 219 (C. C. A. 8).

"It is quite evident that appellee has been and is under a conisderable handicap because of his condition brought about by his injuries and is suffering a decided disability which may be permanent. But how can this court say that such disability is total—to the extent that it prevents him from 'following continuously any substantially gainful occupation'—when the undisputed evidence of the appellee, his wife and his employer agree that he was at the time of the trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer, 'performed his work, there with me satisfactorily,' with absences of only about a week, caused by sickness? The evident injury to appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy but our duty is to take the evidence as we find it and to enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clearly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained."

Unglaub v. United States, 57 Fed. (2d) 650, 652 C. C. A. 7).

"In 1927 he was appointed postmaster for the Home, and in this capacity has served ever since, receiving a salary of $900 per year. It was testified that at times he had more or less of volunteer help from others there in taking care of the mail, but in his four years in this capacity he has mainly done the work; and while it is claimed his want of education narrows his opportunity for lighter service,

his evidently satisfactory service as postmaster indicates a considerable degree of intelligence, as well as adaptability. At any rate, with this record of service, how can it be said that he is totally disabled?"

Instructed verdict for defendant affirmed.

Nalbantian v. United States, 54 Fed. (2d) 63 (C. C. A. 7);

United States v. Perry, 55 Fed. (2d) 819 (C. C. A. 8);

United States v. McLaughlin, 53 Fed. (2d) 450 (C. C. A. 8);

United States v. Crume, 54 Fed. (2d) 556, (C. C. A. 5);

United States v. McGill, 56 Fed. (2d) 522, (C. C. A. 8).

Conclusion.

Plaintiff filed a complaint alleging total and permanent physical disability. Obviously, and for all practical purposes, he admitted that it was not proven. He then in attempting to build up his case after such failure, attempted to establish a nervous total disability. This was without warning to the defendant and the Government submits that if such evidence is to be introduced, it should have an opportunity to rebut. It further submits that a judgment rendered on such evidence and not within the issues established by the pleadings, is erroneous and requests that a new trial be granted.

In addition to this, and giving full weight to the evidence, defendant claims to have been introduced erroneously, plaintiff still failed to establish a total dis-

ability. The law is well established that if a plaintiff is able to work that he is not totally and permanently disabled. And it is undisputed in this case that plaintiff did work at a substantially gainful occupation over a long period of time.

Wherefore, defendant requests that the judgment be reversed and a new trial ordered.

Respectfully submitted,

SAMUEL W. MCNABB,
United States Attorney,

CLYDE THOMAS,
Assistant United States Attorney.

H. C. VEIT,
Regional Attorney U. S. V. B.,
Of Counsel.

No. 6859.

IN THE

United States
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United States of America,
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BRIEF OF APPELLEE.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 6859.

IN THE

United States
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United States of America,
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Appellee.

BRIEF OF APPELLEE.

STATEMENT.

Ronald Baxter, appellee, hereinafter called plaintiff, brought suit on a policy of war risk insurance. By his complaint he alleged the existence of the policy; that on the 22nd day of October, 1918, while said policy was in force, he received a gunshot would in left wrist, shrapnel wounds in lumbar region of back, loss of bone structure from back at the ilium, and fracture of the 4th lumbar vertebra. Plaintiff alleged that as a result of said injuries he was rendered on the 22nd day of October, 1918, totally and permanently disabled; that thereby he became entitled to payments under his insurance contract.

The appellant, hereinafter called defendant, by its answer, admitted the existence of the policy, admitted said policy was in full force and effect on the 22nd day of October, 1918, denied the injuries alleged, admitted that if while the policy was in force plaintiff suffered total and permanent disability said insurance became payable to the plaintiff in monthly installments of $57.50. The defendant alleged said insurance policy lapsed for non-payment of premium due on July 1, 1919.

From the evidence and under appropriate instructions a jury rendered a verdict to the effect that plaintiff became on the 22nd day of October, 1918, totally and permanently disabled. From a judgment entered thereon the United States of America has appealed.

PERTINENT STATUTES AND REGULATIONS.

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed (in Articles III and IV) to be total disability.
>
> "Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person, to whom any installment of insurance has been paid, as provided in Article IV, on the grounds that the insured

has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued and no further installments shall be paid so long as such recovered ability shall continue."

Ford v. United States (C. C. A. 1), 44 Fed. (2d) 754.

ARGUMENT.

By its Assignment of Errors [Tr. pp. 72-73-74] (Brief pp. 6-7-8) defendant in substance makes two contentions from which a reversal of the Judgment herein is requested:

(1) that evidence incompetent under the issues made out by the pleadings was admitted by the trial court;

(2) that the evidence was insufficient to sustain a judgment for plaintiff.

Attention is directed to the fact that neither of said reasons, during the course of the trial, was stated as a reason why a verdict should be directed for the defendant. [Tr. p. 63.] Attention is also called to the fact that no motion, during the course of the trial, was made to strike any alleged incompetent evidence or otherwise to eradicate any prejudice which may have come to the defendant by reason of the Court's failure to sustain the defendant's objection. It will be noted that at the time the objection was made no evidence had yet been introduced by the witness. After the testimony had been received, during the course of the trial, no complaint was made that said evidence did not tend to prove the issue made by the

pleadings. In *Falvey v. Coates* (C. C. A. 8), 47 Fed. (2d) 856, at page 857, the Court stated:

> "The motion for a directed verdict interposed by the defendant stated no grounds upon which it was based. Had the motion been denied, this court would doubtless have declined to review the ruling of the court in denying it because of its insufficiency. A motion for a directed verdict should specifically state the grounds upon which it is urged. It was due the lower court that its attention be specifically called to the grounds upon which the motion was based; it was due to opposing counsel so that they might have an opportunity, either intelligently to oppose the motion, or ask to reopen the case for the introduction of further testimony, or for leave to amend the pleadings, or to move for a nonsuit; it was due the appellate court so as to enable the court to see whether or not the grounds alleged were the same as those presented to the trial court. Where a motion for a directed verdict, failing to state the grounds upon which it is based, is denied, it is unfair to the trial court and to the appellate court; but, where it is granted, it is unfair to the party against whom it is granted;"

And, as stated in *Robinson & Co. v. Belt*, 187 U. S. 41, 23 S. Ct. 16, 19, 47 L. Ed. 65:

> "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reviewed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*."

Notwithstanding, from Treasury Decision No. 20 War Risk, above set out, and from numerous decided cases, the issue to be determined in these cases is: Did the insured during the life of his policy become, within the definition, totally and permanently disabled? Any evidence on that point would seem to be competent and cogent. The issue of total and permanent disability, during the life of the policy, was directly alleged in the complaint and positively put in issue by the answer. The substance of the testimony objected to and given by Dr. Thomas J. Orbison, a distinguished man in his profession, is [Tr. p. 31]:

> "My diagnosis is as follows: gunshot wound in lower dorsal region; lower back with concussion of the spinal cord consequently or sequently. That is what followed. What followed that? Psychoneurosis. What is the type of psychoneurosis? That is the neurasthenic type."

The doctor then testified that, in his opinion, plaintiff was not able to follow continuously any substantial gainful occupation as a result of the injuries received on October 22, 1918; that considering the history of the case, the diagnosis made at the time of the injury, the plaintiff had been unable to follow continuously any substantially gainful occupation since the date of his injury on the 22nd day of October, 1918, and that since the date of the injuries the disabilities were based on conditions which rendered them reasonably certain to remain throughout the lifetime of the plaintiff.

That the defendant could have been surprised by testimony of a nerve injury, due to the wounds described

in the complaint, would seem hardly reasonable in view of testimony submitted by their own witnesses. Dr. Miles J. Breuer, a witness on behalf of the defendant, in his deposition [Tr. p. 50] testified:

> "I saw him frequently in my official capacity during the years of 1919 and 1920, maybe a dozen times during that period. During that time I made several physical examinations of Ronald Baxter * * * I noticed in my examination a large scar due to an H. E. wound in the sacro region, a scar on his wrist, a decrease in weight and general physical vigor and an *unstable condition* of the *nervous system.* * * * For the stomach and nervous condition I advised diet, rest and medicine."

On cross-examination Dr. Breuer testified that the plaintiff was not physically and mentally feasible for vocational training on June 22, 1920.

Dr. Rock, a witness on behalf of defendant [Tr. pp. 54-55], testified that he had examined plaintiff in 1928. He testified that the plaintiff was given a complete physical examination. In response to the following questions in direct examination, he testified:

> "Q. And did that examination cover such things as would determine if his spinal cord had been injured by that scar? A. Yes, sir.
>
> Q. Or not? A. Yes, sir.
>
> Q. In what manner was that tested, Doctor? A. Do you mean for injury to his spinal cord?
>
> Q. Yes. A. Well, it comes under the head of reflexes, his reactions, nervous reactions, to various impulses.
>
> Q. Was there a complete examination made in that regard? A. Yes.
>
> Q. Did that examination show that there was any injury to the spinal cord? A. Yes, sir."

On cross-examination Dr. Rock testified [Tr. p. 58] that at the time of his examination:

> Plaintiff complained of "general run-down condition, no pep, weak, work or exercise for an hour requires three hours to get over it; weakness appears to be more in the back and hips; does not rest well at night; appetite is poor; pain in lumbar region all the time; this is increased on exercise or being on feet; also has pain in left leg from being on feet; has weakness of left hand; has sharp darting pains in left side of face; these come and go." The doctor testified that such complaints are not unusual in a person suffering from a nervous condition or a nerve injury.

In *United States v. Tyrakowski* (C. C. A. 7), 50 Fed. (2d) 766, at page 768, the Court, after discussing the definition of a total disability as used in a war risk insurance contract, stated:

> "In order for appellee to recover it was not necessary for him to prove that such disability occurred while he was serving in the war nor that it was occasioned by such service. *It is sufficient if it occurred from any cause prior to lapse of his policy at midnight on August 31, 1919.* On the other hand the policy does not cover any total permanent disability which began after August 31, 1919, even though it was caused by his service in the war." (Italics, this writer's.)

and on page 770:

> "He does not attempt to classify his disease by name and it is not necessary for him to do so."

In *Hayden v. United States* (C. C. A. 9), 41 Fed. (2d) 614, may be found a strikingly similar injury and proof with substantially the same pleadings.

It is respectfully submitted that, if counsel did not know that there was a more serious condition than the loss of skin or muscle due to the injuries alleged, he should, with reasonable investigation in view of his own testimony, have known such fact.

POINT II.

Sufficiency of Evidence to Support Verdict for Plaintiff.

Defendant's contention is stated in paragraph five, page five, of their brief as follows:

> "The other and more important point is that plaintiff failed to establish total disability in that an actual work record, even of a part time job such as was performed in the Soldiers' Home, defeats the proof of total disability."

Plaintiff's record in the Soldiers' Home appears from the testimony of Arthur J. Cassiday [Tr. pp. 61-62], a witness on behalf of the defendant, and from the testimony of plaintiff. [Tr. p. 21.] In order to obtain an accurate view of this part time work, which defendant contends shows as a matter of law plaintiff was able to follow continuously a substantially gainful occupation, plaintiff's history and efforts under competition should be observed. Plaintiff's testimony disclosed:

> That at the time of his enlistment he was 25 years of age; that he had attended school until he was 14; that prior to entering service he had worked regularly as a farm and ranch hand; that on the 22nd day of October, 1918, while engaged in combat at the front he had been seriously injured by being struck in the wrist and in the dorsal region of his back. [Tr. pp. 18-25 incl.] He testified that at the time of the injury he was almost cut in half and left on the field to be picked up by stretcher bearers; that at the time of his injury he was paralyzed from the waist down for several months and that he remained in the hospital from the date of his injury to the date of his discharge. While in the hospital, and

thereafter, he had had pains in his back and pains in his head; that his stomach had bothered him and that he had been unable to pass urine without aid; that since his injury he has experienced difficulty and discomfort at all times, especially while on his feet or walking, this in the small of his back and in the left hip and left leg; that he had difficulty getting rest at night; that he has had pains in his shoulders and in the back of his head; that he could not hold his body up easily; that to a certain extent he has dispensed with the use of a brace; that these complaints have continued up to the date of trial.

The Adjutant General's report [Tr. p. 18] shows the following record made of the injury prior to the plaintiff's discharge from service:

> "Shrapnel (1) scar 10 inches long oblique through lower lumbar and sacrial region fracturing spine at 5th lumbar vertebra and crest of left ilium; (2) superficial scar posterior surface of wrist left."

With this conceded permanent injury, the record disclosed the following industrial history:

> That upon being discharged from service plaintiff obtained employment as a night watchman; that after two months he had to give this up because incidentally in the position it was necessary for him to handle oxygen drums and because he suffered from physical exhaustion. [Tr. p. 19.]
>
> That thereafter he entered vocational training, under government supervision, taking first an agricultural course, then a music course, then a business course, then a salesmanship course; all of which were unsuccessful; then he was declared unfeasible for further training. [Tr. p. 19.]

That his training was a failure because of difficulty in concentrating, because of his extreme nervousness and because he could not get the required rest at night because of injuries received in service.

He then sought employment and obtained a position with the Dixon Book Company, which employment ended after two weeks; selling books required walking and he could not stand on his feet.

He sought employment with the Goodyear Tire & Rubber Company and with the Telephone Company and was turned down by each after a physical examination. [Tr. p. 20.]

He then sought employment with the Shore Investment Company on a purely commission basis. This he had to give up after about two weeks [Tr. p. 23] * * * this required walking on pavement and he could not stand the pace. Thereafter in 1924 he entered the Soldiers' Home in Sawtelle, California.

From this evidence, it is submitted, the jury had the right to believe:

(1) That the Government, after sincere efforts to rehabilitate the plaintiff in some occupation which would give a reasonable livelihood, had failed due to plaintiff's disabilities;

(2) That because of disabilities suffered by the plaintiff he was unable to compete with men of sound body and average attainments under the usual conditions of life. See *United States v. Cox* (C. C. A. 5), 24 Fed. (2d) 944.

The plaintiff testified:

That shortly after entering the Soldiers' Home in 1924 he obtained a position as an elevator man

> and janitor. [Tr. pp. 21-22.] He testified that he then followed this occupation for three or four years. [Tr. pp. 22-23.] The records of the institution, however, disclose that he worked from October until December, 1924, at $25 per month; that he was next employed between February and May, 1925, at $24 per month; from August to November, 1925, at $24 per month; that he was not again employed until 1927, when he worked from January to March at a salary of $24 per month; from April to July, 1927, at $28 per month; from September, 1927, to March 1, 1929, at $24 per month; on March 1, 1929, his salary was increased to $35 per month, and this he received until October 30, 1930. On November 26, 1930, he again went to work at a salary of $40 per month, which he was receiving at the time of trial in July, 1931. [Tr. pp. 61-62.]

Counsel in his brief (p. 13) seeks to leave the impression that plaintiff left and re-entered the Soldiers' Home. We think such statement may be compared with counsel's impression in his brief (pp. 3-4) wherein he states:

> "Plaintiff testified that after his discharge from the army he attempted to do certain work requiring the handling of heavy boxes * * * he also had a job as night watchman for a short time;"

The record is clear that these two jobs are one and the same [Tr. p. 19]; and to counsel's inference in his brief that a part of the remuneration received for the work done at the Soldiers' Home was the board and room supplied to the inmates. Likewise to counsel's statement, under Specification of Error No. 5 (Brief p. 7), wherein he comments:

> "This specification is based on the fact that the evidence is undisputed, that plaintiff had actually worked at a substantially gainful occupation almost continuously since October 8, 1924, a period of about eight years."

Of course, it is plaintiff's contention herein that the evidence shows no substantially gainful occupation. Whether the "almost" refers to the period of time between the date of trial in July, 1931, and a date of eight years after plaintiff's record appears in the Soldiers' Home, which would be October 8, 1931, or whether it refers to the five months in 1925, the year of 1926, the 45 days in 1927, or the 26 days in 1930 in which plaintiff did not work, is not clear. While it may be possible that a jury, from the present state of the record, could deduce that plaintiff had left and returned to the Soldiers' Home, the inference in this court is to the contrary. The testimony, as it appears in the record, is that the plaintiff now lives in the Soldiers' Home [Tr. p. 18]; that he entered the Soldiers' Home in 1924 [Tr. p. 21]; that right after entering the Home he went to work as a janitor and elevator operator at which job he remained for three or four years [Tr. p. 23]; from his testimony the three or four years would be late in the year of 1927 or 1928. It is clear, we think, the evidence does not bear out counsel's statement or impression, that plaintiff left and reentered the Soldiers' Home.

Part Time Work in Soldiers' Home Does Not Show as a Matter of Law That Plaintiff Was Able to Follow Continuously Any Substantially Gainful Occupation.

In this court:

> "The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear, but is also entitled to the benefit of such reasonable inferences as arise out of the facts proved."
>
> *United States v. Meserve* (C. C. A. 9), 44 Fed. (2d) 549-552.

The evidence is:

> "The duties are taking care of picking up laundry and distributing laundry and company property to the men and looking after the company generally. The actual work amounts to about one hour a day. I was not required to work continuously. The duties do not require it. I could do all the work there was to do in less than one hour and then I was free to do as I pleased from then on as long as I stayed around the company." [Tr. p. 21, testimony of Baxter.] Also see testimony of Newcomb. [Tr. p. 62.]
>
> Such jobs are given only to inmates of the institution and to the better type of individuals in the institution. Testimony Cassiday [Tr. p. 62] and Newcomb. [Tr. p. 62.]

It is submitted the jury had the right to conclude that such duties were not employment at all, but rather a reward for good character and right living, thereby assisting in maintaining discipline among the inmates of the institution.

In *Hayden v. United States, supra,* under somewhat similar circumstances, Judge Dietrich stated:

> "And we think it a question for the jury whether his conduct in that respect (lack of occupation) was due to disability or unwillingness or some other cause."

In *Sorvick v. United States* (C. C. A. 9), 52 Fed. (2d) 406, this court stated:

> "In measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff we must bear in mind the remedial purposes of the World War Veterans Act * * *, which the Courts have repeatedly held should be liberally construed in favor of the veterans."

Fairly, it would appear, in no better way may the definition of a total disability in a war risk insurance policy be construed liberally than to allow the words in the definition to have their full force and usual meaning, that is, to allow a "substantially gainful occupation" to mean a substantially gainful occupation; not to substitute in law a "mere pittance" for the words substantially gainful occupation.

In *United States v. Sligh* (C. C. A. 9), 31 Fed. (2d) 735, Judge Gilbert said:

> "The term 'total and permanent disability' obviously does not mean that there must be proof of absolute incapacity to do any work at all. It is enough if there is such impairment of capacity as to render it impossible for the disabled person to follow continuously any substantially gainful occupation."

In *United States v. McPhee* (C. C. A. 9), 31 Fed. (2d) 243, this Court stated:

> "Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all."

In *United States v. Phillips* (C. C. A. 8), 44 Fed. (2d) 689-691, the Circuit Court of Appeals for the 8th Circuit stated:

> "The term 'total and permanent disability' does not mean that the party must be unable to do anything whatever; must either lie abed or sit in a chair and be cared for by others."

In *United States v. Rasar* (C. C. A. 9), 45 Fed. (2d) 545-547, this Court stated:

> "The mere fact that appellee may be able to engage in some light occupation requiring very little physical effort, or that he may work at short intervals at some character of employment, does not imply that he may not be totally disabled within the meaning of the World War Veterans Act, as amended, 38 U. S. C. A., Section 473, and its regulations * * * if his disability renders it impossible for him to pursue continuously any gainful occupation for which he is physically and mentally qualified, that in law amounts to total disability."

In *Wood v. United States* (D. C.), 28 Fed. (2d) 771, Judge McDermott, speaking of a veteran, plaintiff, an inmate of a Soldiers' Home, who made some income by picking up and distributing laundry, said:

> "I am of the belief that when, by reason of physical or mental disability, the insured is compelled

> to drop out of the ranks of the workers of the world, and stand by the side of the road and watch the world go by, there is liability under the policy."

It is submitted that to hold as a matter of law the part time employment herein set out, requiring less than one hour a day, and then not continuously, entailing no mental or physical effort, would be to hold that any work at all disproves total disability within a war risk insurance contract. It would be to hold that an inmate of a charitable institution has not dropped out of the ranks of the workers of the world. We submit that such would be unreasonable and arbitrary, and contrary to the definition of the terms accepted by most of the courts. (*Burgoyne v. United States* (Ct. of App. D. C.), 57 Fed. (2d) 764-766.)

Substantial Testimony Tending to Show Total Disability.

In *United States v. Burke* (C. C. A. 9), 50 Fed. (2d) 653-656, this Court stated:

> "The right to a jury trial is guaranteed by the constitution, and it is not to be denied, except in a clear case. The foregoing decisions, and many others that might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue, to which the jury might properly give credit, the court is not authorized to instruct the jury to find a verdict in opposition thereto."

In *United States v. Tyrakowski, supra* (p. 770), the Court stated:

> "The only question presented to us is whether or not there was substantial evidence submitted to the effect that appellee was totally and permanently disabled on or before July 31, 1919. We think appellee's testimony alone prevents us from answering this question in the negative, in view of the Treasury Department's definition of total disability."

In the instant case the testimony is that repeated and prolonged efforts on behalf of the Government to rehabilitate the plaintiff, after his injury, resulted in failure. The testimony is that the plaintiff made repeated efforts to follow an occupation and each effort resulted in failure, due to the injury received when the policy was in force.

The testimony of Dr. Orbison is that:

> "Now, within the definition, the plaintiff is totally disabled; that he was totally disabled on the date of his injury and at all times thereafter. [Tr. pp. 31-32.] That the plaintiff has a decided phychoneurosis and an involvement of his vegetative nervous system, that he got at the time he got his shock to the cord. [Tr. p. 40.] That the injury will prevent the plaintiff from doing any work rather than the plaintiff becoming injured by the work he does." [Tr. p. 38.]

The testimony of Dr. Orr, a witness on behalf of the defendant, is that the plaintiff was a patient of his clinic during the year of 1920, and under cross-examination [Tr. p. 49] Dr. Orr testified:

> "At the time I examined him, he was having an amount of pain and disability that might have interfered with many kinds of employment."

The testimony of Dr. Miles J. Breuer, a witness on behalf of the defendant, is that he saw the plaintiff frequently during the years of 1919 and 1920; and in cross-examination [Tr. p. 51] Dr. Breuer testified:

> "At that time he was probably unable to follow continuously any gainful occupation. * * *" "The spinal column is an important part of the human anatomy."

and in redirect examination [Tr. p. 51]:

> "From my observation of this man it appeared to me that he was one of those constitutionally subnormal people who are not quite fully equipped to fight life's battles independently * * *"

From Government's Exhibit "A", it was noted at the time of plaintiff's discharge from the army:

> "The wound or injury is likely to result in death or disability."

From the testimony of Dr. Rock, a witness on behalf of the defendant [Tr. p. 55], who examined the patient in 1928:

> "The examination showed an injury to the spinal cord"

and further [Tr. p. 57]:

> "My opinion is that the man's disability will not improve or get worse. It is stationary in its present stage."

Conclusion.

It is respectfully submitted that the evidence shows, that at a time premiums were paid on the plaintiff's policy of insurance, plaintiff suffered a severe and permanent injury; that the evidence disclosed he has not followed continuously any substantially gainful occupation; that there is substantial evidence showing that the reason for said lack of substantially gainful occupation is because of the injuries received; and that the verdict of the jury should be sustained.

Respectfully submitted,

DAVID SPAULDING,
Attorney for Appellee.

No. 6876

United States

Circuit Court of Appeals

For the Ninth Circuit

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,

Plaintiffs—Plaintiffs—in—Error,

vs.

THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant—Defendant—in—Error.

Transcript of Record

UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

PRINTED BY ANGCO PRINTING

No.

United States

Circuit Court of Appeals

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TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,

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THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant—Defendant—in—Error.

Transcript of Record

UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

PRINTED BY ANGCO PRINTING

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiff-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-error.	ERROR TO CIRCUIT COURT FIRST CIRCUIT. HONORABLE A. M. CRISTY, PRESIDING.

LIST OF PAPERS, ENTRIES, DOCUMENTS, PLEADINGS, OPINION, FINAL JUDGMENT, TRANSMITTED TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT ON APPEAL.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
v.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

1. COMPLAINT
2. MOTION FOR APPOINTMENT OF NEXT FRIEND
3. ORDER ON MOTION
4. SUMMONS

FILED
At 11:05 o'clock A. M.
Nov. 19, 1930
D. K. SHERWOOD
Clerk

ULRICH & HITE,
430 Dillingham Building,
Honolulu, T. H.
[Attorneys for Plaintiff]

RETURNED
At 2:00 o'clock P. M.
Nov. 19, 1930
D. W. SHERWOOD,
[Clerk]

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant.	TORT

COMPLAINT

Come now TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by their next friend, VICTOR FERIL ANGCO, plaintiffs herein, and, complaining of THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, defendant herein, for cause of action allege as follows:

I.

That plaintiffs are now and at all times hereinafter mentioned have been minors, and are residents of the Philippine Islands; that VICTOR FERIL ANGCO, their uncle and next friend, is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; that THE STANDARD OIL COMPANY OF CALIFORNIA is a foreign corporation, duly licensed and doing business within the Territory of Hawaii, and having its principal place of business in said Honolulu.

II.

That plaintiffs are the minor children of Felix Angco, now deceased.

III.

That said Felix Angco during his lifetime was the sole support of plaintiffs herein.

IV.

That on, to-wit, June 16, 1930, one REGINALD C. WARNER was an employee or agent of said defendant.

V.

That on said date said Warner, while driving a certain automobile on business for defendant, and while acting within the scope of his employment, did on the public highway of the County of Maui, Territory of Hawaii, so recklessly, negligently and in such utter and gross disregard of the rights of others drive said automobile as to collide with and strike said Felix Angco, as a result whereof said Felix Angco did on, to-wit, June 19, 1930, die.

VI.

That in any by the death of said Felix Angco plaintiffs were deprived of the support to which they might legally look from said Felix Angco, and were damaged in the sum of $35,000.00.

That at the time and place aforesaid when said Felix Angco was so struck by said Warner, said Felix Angco was in no wise guilty of contributory negligence, but was at said time and place acting within the lawful exercise of his legal rights.

WHEREFORE IT IS PRAYED that process of this Court do issue, citing and summoning defendant to appear and answer this complaint as is by law provided; that upon

hearing hereof plaintiffs may have judgment of and against defendant in the sum of $35,000.00, together with their costs herein.

Dated: Honolulu, T. H., November 18, 1930

TIMOTEO ANGCO and CIPRIANO ANGCO,
Plaintiffs,
By VICTOR FERIL ANGCO
Their Next Friend.

TERRITORY OF HAWAII,) SS
City and County of Honolulu,)

VICTOR FERIL ANGCO, being first duly sworn, on oath deposes and says; That he is the uncle and next friend of TIMOTEO ANGCO and CIPRIANO ANGCO, Minors; that he has read the foregoing complaint by him subscribed, knows the contents thereof, and that the same are true.

(S) VICTOR FERIL ANGCO

Subscribed and sworn to before me this 18 day of November, A. D. 1930.

(S) KATHRYN R. CONNOR
Notary Public, First Judicial Circuit,
Territory of Hawaii.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
v.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

MOTION FOR APPOINTMENT OF NEXT FRIEND

Come now TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by their attorneys, Ulrich & Hite, and move for the appointment of VICTOR FERIL ANGCO as their next friend to prosecute the above entitled action.

This motion is based upon the records herein.

Dated: Honolulu, T. H., November 19, 1930.

TIMOTEO ANGCO and CIPRIANO ANGCO,
Minors,

By ULRICH & HITE.
By (S) Chas. M. Hite
Their Attorneys

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
v.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

ORDER ON MOTION

Good cause appearing therefor, VICTOR FERIL ANGCO is hereby appointed next friend of TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, to prosecute on their behalf the above entitled cause.

Dated: Honolulu, T. H., November 19, 1930.

(S) WILLIAM C. ACHI
Judge, Circuit Court,
First Judicial Circuit,
Territory of Hawaii.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

A. D. 19 . . . . Term

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
v.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TERM SUMMONS

THE TERRITORY OF HAWAII:

TO THE HIGH SHERIFF OF THE TERRITORY OF HAWAII, OR HIS DEPUTY; THE SHERIFF OF THE CITY AND COUNTY OF HONOLULU, OR HIS DEPUTY, OR ANY POLICE OFFICER IN THE TERRITORY OF HAWAII MAKING SERVICE HEREOF:

YOU ARE COMMANDED to summon the above named Defendant . . . ., in case it shall file written answer WITHIN TWENTY DAYS AFTER SERVICE HEREOF, to be and appear before the First Circuit Court at the Judiciary Building in Honolulu, at the term thereof pending immediately after the expiration of twenty days after service hereof; TO SHOW CAUSE why the claim of the above named Plaintif . . s . . should not be awarded pursuant to the tenor of the annexed Complaint.

AND have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit

Court of the First Judicial Circuit at Honolulu aforesaid, this 19 day of November, 1930.

(S) D. K. SHERWOOD
Clerk.

SHERIFF'S RETURN

SERVED the within summons on STANDARD OIL COMPANY OF CALIFORNIA, through E. J. McClanahan, Manager

at ..... Honolulu, T. H., ... this 19th day of November, 1930, by delivering to him a certified copy hereof and of the complaint hereto annexed and at the same time showing him the original.

Dated Nov. 19, 1930.

(S) MOSES W. KAULULAAU
Police Officer

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
-vs-
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant

TORT

DEFENDANT'S ANSWER

FILED
AT 3:50 o'clock P. M.
Dec. 8, 1930
D. K. SHERWOOD
Clerk

SMITH & WILD
McCandless Bldg.,
Honolulu, T. H.
Attorneys for Defendant.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend.
Plaintiffs,
-vs-
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

DEFENDANT'S ANSWER,
TO THE HONORABLE, THE PRESIDING JUDGE OF THE ABOVE-ENTITLED COURT:

Comes now THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, the above-named Defendant, by its attorneys SMITH & WILD, and by way of answer to Plaintiffs' Complaint heretofore filed herein denies each and every, all and singular, the allegations therein contained.

WHEREFORE, Defendant prays that it be hence dismissed with its costs herein incurred.

DATED: Honolulu, T. H., this 8th day of December, 1930.

THE STANDARD OIL COMPANY
OF CALIFORNIA,
By SMITH & WILL
Its Attorneys,
By (S) C. A. Gregory

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
vs.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

DEMAND FOR JURY TRIAL

FILED
AT 1:50 o'clock P. M.
DEC. 12, 1930
D. K. Sherwood
Clerk

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.
Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
vs.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

DEMAND FOR JURY TRIAL

Come now TIMOTEO ANGCO and CIPRIANO ANGCO, minors, by VICTOR FERIL ANGCO, their uncle and next friend, plaintiffs, by ULRICH & HITE, their attorneys, and demand a jury for the trial of the above entitled cause.

Dated: Honolulu, T. H., December 11 A. D. 1930.

Certify served on Defendant Dec. 11, 1930 by mailing true copy to its attorneys.
SMITH & WILD.
Chas. M. Hite

TIMOTEO ANGCO and CIPRIANO ANGCO, minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs
By ULRICH & HITE
By (S) Chas. M. Hite
Their attorneys

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
vs.
IE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendant.

TORT

JUDGMENT
46/58 $20.50

FILED
AT 2:56 o'clock P. M.
MAR. 3, 1931
JOHN LEE KWAI
Clerk.

SMITH & WILD
207-214 McCandless Bldg.,
Honolulu, T. H.
Attorneys for Defendant.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII.

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Plaintiffs,
vs.
THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,
Defendants.

TORT

JUDGMENT

This action by petition to recover damages in the sum of $35,000 came to the present term when the parties appeared and were at issue to the jury on the 18th day of February 1931.

Said cause having been heard and committed to the jury on February 25, 1931, and the jury returning a verdict for the defendant pursuant to the direction of the court.

IT IS THEREFORE ADJUDGED that the Plaintiffs, recover nothing of the Defendant and IT IS FURTHER ADJUDGED that judgment be for the Defendant, and that the Defendant recover from the Plaintiffs herein its costs taxed in the sum of $45.50.

BY THE COURT:
John Lee Kwai
Clerk

O. K. as to form
ULRICH & HITE

ENTERED THIS ..... day
of ....., 1931.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO DECREE OF THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

WRIT OF ERROR

Received and filed
in the Supreme Court and issued
July, 9, 1931

AT 3:15 o'clock P. M.
(S) ROBERT PARKER JR.
Assistant Clerk

F I L E D
AT 3:50 o'clock P. M.
JULY 9, 1931
D. K. SHERWOOD
Clerk.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error	WRIT OF ERROR TO DECREE OF THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY, SECOND JUDGE PRESIDING

WRIT OF ERROR

THE TERRITORY OF HAWAII:

To the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Law:

Application having been made on behalf of said TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, for a writ of error in the above-entitled case, you are commanded forthwith to send to the Supreme Court the record in said case.

WITNESS the Honorable Antonio Perry, Chief Justice of the Supreme Court, this 9th day of July, A. D. 1931.

(S) ROBERT PARKER, JR.
Assistant Clerk of the Supreme Court

RETURN OF WRIT OF ERROR

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated at Honolulu, T. H., this 28th day of July A. D. 1931.

[SEAL]

(S) D. K. SHERWOOD
Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Receipt of a copy of the foregoing writ of error is hereby acknowledged this 8 day of July A. D. 1931.

SMITH & WILD,

By (S) C. A. GREGORY
Attorneys for Defendant-Defendant-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

OCTOBER TERM, 1931.

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs in error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant in error.	ERROR TO CIRCUIT COURT FIRST CIRCUIT. HON. A. M. CRISTY PRESIDING

OPINION OF THE SUPREME COURT.

Filed December 8, 1931,
At 2:44 P. M.

(S) J. A. THOMPSON,
Clerk.

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

OCTOBER TERM, 1931.

TIMOTEO ANGCO AND CIPRIANO ANGCO, MINORS, BY VICTOR FERIL ANGCO, THEIR UNCLE AND NEXT FRIEND, v. THE STANDARD OIL COMPANY OF CALIFORNIA.

NO. 2031.

ERROR TO CIRCUIT COURT FIRST CIRCUIT
HON. A. M. CRISTY, JUDGE.

Argued November 27, 1931. Decided December 8, 1931.

PERRY, C. J., BANKS AND PARSONS, JJ.

Master and Servant—negligence—automobiles—liability of master.

The negligence of an employee of a corporation in operating an automobile, the property of the corporation, which was furnished him by the general agent of the corporation for the sole purpose of returning from a personal enterprise, in which he had been engaged, to the place of his employment where there is no emergent need of his services, is not imputable to the corporation.

OPINION OF THE COURT BY BANKS J.

This is an action brought by Timoteo Angco and Cipriano Angco, minors, who sue by Victor Feril Angco, their uncle and next friend, against the Standard Oil Company of California, a corporation. The action is for damages arising out of the death of the father of the plaintiffs, upon whom they claim they were dependent for support. It is disclosed by the evidence that Felix Angco, the father, died on June 19, 1930, as the result of having been struck while standing on a public highway on the Island of Maui, by an automobile, the property of the defendant, and which at the time of the collision was being operated by one Reginald Warner, who was in the employment of the defendant as chief engineer on the steamship Lubrico, also owned by the defendant. The action is based on the alleged negligence of Warner in operating the automobile.

At the conclusion of the plaintiffs' case and after they had rested and after the defendant, without introducing any evidence, had also rested, a motion was made by the defendant for a directed verdict. This motion was granted and a verdict was accordingly returned in favor of the defendant and against the plaintiffs. The case is here on a writ of error.

One of the errors assigned is: "The court below erred in that he ruled as a matter of law that the defendant's employee Warner was not acting within the scope of his employment as an agent of the defendant corporation, the Standard Oil Company of California, so as to make said company liable for his negligent acts when he, Warner, committed the negligent acts complained of."

Reginald Warner, who was called as a witness by the plaintiffs, testified that on June 16, 1930 (the date of the accident), he was employed by the defendant as chief engineer on the steamship Lubrico, which was at that time anchored at Kahului on the Island of Maui; that he re-

membered the accident in question and that he was at the time driving the automobile and was going towards the ship. When he was asked the question, "And you were going, were you not, to the steamship 'Lubrico,' " he answered, "We were going towards the steamship. I think we were going to stop and eat in Kahului first." He was then asked if he had not already testified that he was going to the steamship. He answered, "Yes," and then he was asked, "And you were, were you not?" to which he answered, "Not direct. I asked the captain if he wanted to eat, and he said, 'When we get down we will see.' " He was then asked, "And before going to sea you expected to eat in Kahului?" and answered, "Yes," and that aside from this he was on his way to the boat. He was then asked whether his duties on the boat would have to do with whatever the usual duties of the chief engineer are on a steamship, to which he answered, "Yes." He was then asked the following questions, to which he gave the following answers: "Q The boat was going to sea that night? A Yes. Q Captain Daniels was with you at the time? A Yes. Q He is the captain of the boat? A Yes. Q And the boat would go to sea under his command? A From the outside of Kahului harbor." On cross-examination the witness testified that as chief engineer of the steamship Lubrico he had no duties on shore at Kahului on the night or afternoon of June 16, 1930; that at the time he was driving the automobile he had not come from performing any duties for the Standard Oil Company and at the time he was driving the car he was not performing any duties for said company; that he was driving down to have a sandwich before going on the boat; that he had been chief engineer for several years and during that time had been in the employment of the defendant. At this juncture the following occured: "The Court: The court would like to ask a question in view of the line of examination taken, in anticipation of being called upon to make rulings in the matter. When you went ashore did you go ashore in connection with being under or-

ders from anybody having a right to give you orders, or were you on shore that night? A Whenever I go on shore I can go as I please. The Court: Did any one order you to go ashore in connection with the boat? A No. The Court: In connection with driving the automobile that night did anyone give you any orders in connection with driving the car? A No. The Court: Did anyone give you any orders as to where you should go? A. No. The Court: At the time of the accident were you under orders of any superior, orders of anyone on the boat? A No, I just asked him if he wanted to eat. The Court: At the time you got in the car to go back to the boat the captain was with you? A Yes. The Court: Did the captain give you any orders as to returning to the boat and resuming your duties at that particular time? A No, sir. The Court: Were you performing any task or errand on behalf of the captain? A No, sir. The Court: When did you leave the 'Lubrico' to come ashore? A Between 2:30 and 3 o'clock. Q The Court: At that time were you on any errand connected with the boat? A No, sir. The Court: Were you in company with the captain under his orders to accompany him? A No, sir, I went there mostly with Mr. Burns to play golf. The Court: A pleasure trip? A Yes. The Court: When were you due back on the boat? A I asked the chief officer when he would be ready to go and he said between 9 and 11, so I thought to get back about 7:30. Mr. Pittman" (for defendant) "Q When you are on shore has anybody got any power over you at all or can they give you any authority at all? A No, I might respect his position and do a thing or two, but he has no authority. Mr. Pittman: Q Has anybody on the ship any authority over you when you are on land off the ship? A No, sir. * * * Direct examination (continued) By Barry S. Ulrich, Esq." (For plaintiff): "Q It was your duty, was it not, to be back on the boat in time to sail? A Yes. Q And of course you say you are on your own more or less while you are ashore but the agents of the company have the

right, have they not, to indicate to you when the boat would sail; that is, if they decided to sail earlier you would have to appear on the boat. I mean the persons in authority were so in authority of that vessel? Mr. Wild: I object as purely speculative. There is no showing that boat changed its schedule that night. They were to sail at 9 and they proceeded back at 7:30. It is purely speculative. (Argument) The Court: The court will assume that a man on the boat if and when notified to return at an earlier time, if he wants to keep his job, would have to come back, but there is no showing there was any call to return earlier. Objection sustained. Q In other words, it was your duty to be on the boat in time to sail? A Yes. (Cross-examination waived.)"

The plaintiffs then offered, and the court received, in evidence an ordinance of the County of Maui relating to speed limits in residence districts. This concluded the testimony. Thereupon the defendant made a motion for a directed verdict, one of the grounds being that the plaintiffs' evidence showed affirmatively that Warner was not acting in the course or scope of his employment or upon the business of the defendant at the time of the accident. Before the motion was acted upon the plaintiffs (through counsel) moved that the court reopen their case and permit them to put further evidence. At this point, upon the request of the court that he be more specific as to what proof he offered to make, Mr. Ulrich continued: "We offer to prove by Mr. Burns that he did authorize Mr. Warner to take the car for the purpose of driving himself and the captain down to resume their duties on the boat. We offer to show that at first he said he would take them down himself, but later said he had a social engagement and they should take the car and leave it at the wharf and he would pick it up there later. We offer to prove Mr. Burns was the agent and representative of the Standard Oil Company on the Island of Maui, with general authority to attend to all necessary de-

tails of the business of that company on the Island of Maui having to do with the conduct of the business with reference to the disposition of merchandise on Maui and with reference to the necessary details concerning the despatch of the company's business."

The defendant objected to the granting of the motion on the ground that Burns, the proposed witness, had been in attendance, at the request of plaintiffs' counsel, during the trial, but, at the conclusion of the evidence, had returned to Maui. During the argument of the motion the court asked Mr. Ulrich the following question: "Do I understand that your offer means to prove that Mr. Burns in his office as an official of the company was requested to use the company's automobile for any other purpose than the conveyance of the captain and the engineer in returning from their holiday to their duties on the boat?" In answer to this question Mr. Ulrich replied: "In this particular instance he authorized the use of the automobile for the company's purposes in getting the men back to the boat." The court then asked the following question: "Was there any other company's business of any kind connected with your offer of proof that Mr. Burns was requested or concerned with furthering than the matter, whatever inference may be drawn from it, of assisting these two men in returning to the boat?" to which Mr. Ulrich reflied: "That's all." The following colloquy then occured: "Mr. Wild: From the offer of proof, as it now appears, it would not change the court's ruling, and counsel has in everything he contends to be a fact. Mr. Ulrich: If it will be admitted, as a matter of record, that Mr. Burns authorized the use of this car for the purpose of getting the men back to the boat, and further admitted that Mr. Burns is a representative of the Standard Oil Company on Maui. The Court: I understand the extent of opposing counsel's admission is that Mr. Burns is distributing and sales manager of Standard Oil Company pro-

ducts on the Island of Maui, having no supervision or control over the movement of the boats. Mr. Wild: That is an accurate statement. The Court: And automobile in question, Mr. Burns was under no orders or requests on company business other than could be inferred by your argument that the return of the men from their holiday in some way benefited and expedited the company's affairs as to the boat. Mr. Wild: We will admit that. The Court: Well, then it is not necessary to make the offer, and I deny the motion."

Since the trial court did not base its refusal to allow the plaintiffs to reopen the case and to make the proof which they offered to make on the ground that the offer was not sufficient or that under the circumstances it came too late, but solely on the ground that the proof, if made, would not alter the legal status of the parties, we will pass the question of whether it was an abuse of discretion to deny the motion without comment and treat the case as though the proof had been made.

The first contention of the plaintiffs regarding the action of the trial court in directing a verdict for the defendant is that under the evidence it was a question for the jury to decide whether Warner at the time of the accident was returning to the "Lubrico" for the purpose of meeting an emergency in the defendant's business, and if he was returning for such purpose, he was, as a matter of law, engaged in the defendant's business and the defendant would be liable for his negligence. The trouble with this contention is that it is entirely unsupported by the evidence. The testimony of Warner, which is uncontradicted and which was vouched for by the plaintiffs, he having been called as a witness by them, shows that when he left the "Lubrico" between 2:30 and three o'clock on the afternoon of June 16 to play golf he was informed by the chief officer that the boat would sail between nine and eleven o'clock that

night and that he (Warner) "thought to get back about 7:30." This is the evidence and th only evidence upon which the plaintiffs rely to establish an emergency. It falls far short of the mark. It has no tendency whatever to show that the necessities of the defendant's business, in any of its aspects, required Warner to return by 7:30 o'clock or at any definite hour before the boat sailed. It only shows that he knew the hours within which the boat would sail and that he intended to return to it by a certain time. Whether he intended to do this because of some duty which he as chief engineer was required to perform in connection with the departure of the boat or whether he merely preferred, for his own pleasure or convenience, to spend the time intervening between 7:30 and the hour of sailing on the boat or in its vicinity does not appear. The jury was very properly not permitted to speculate about this.

In order to hold the defendant liable on the theory of an emergency it was necessary for the plaintiffs to introduce substantial evidence, amounting to more than a scintilla, that such a condition existed. Not having done this the contention now under consideration cannot be sustained.

The plaintiffs also contend that irrespective of whether there was evidence of an emergency defendant is nevertheless liable because Burns, the defendant's agent on Maui, authorized Warner to use defendant's automobile as a means of returning to the boat. This contention cannot be sustained unless it can be said that in returning to the boat from his game of golf Warner was engaged in the defendant's business. The court below took the view that under the evidence he was, as a matter of law, not so engaged and directed a verdict accordingly.

It is argued on behalf of the plaintiffs that under the evidence this was a question of fact for the jury to decide and therefore the action of the court in withdrawing it from the jury was erroneous. In support of this argument

the familiar rule, that if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of the master's business, is invoked. This rule, however, is subjecte to an exception which is as firmly established as the rule itself, this exception being that when the evidence, which is uncontradicted and unimpeachable, shows that the employee was engaged in the pursuit of his own business or pleasure, the inference recognized by the rule disappears and the employer, as a matter of law, is not responsible for the results of his employee's negligence. The books are full of cases in which courts have applied either the rule or the exception, according to the facts presented.

The plaintiffs have directed our attention to several cases in which the rule was adopted and the exception rejected. One of these is **Casteel** v. **Yantis-Harper Tire Co.,** 36 S. W. (2nd) 406, 408. In this case the plaintiff, while standing in the safety zone at Eleventh street and Garrison avenue in the city of Fort Smith, was struck by an automobile the property of the defendant, which was being driven by an employee of the defendant who had been such for several years. It appears from the opinion of the court that the testimony on the part of the defendants was "to the effect that, although Tolliver had been employed by Yantis-Harper for several years, he was paid by the day, and was only paid when he worked, and that he was not employed or paid on the day of the injury. Tolliver testified that he was not employed on this day, and the cashier and time keeper of Yantis-Harper gave testimony to the same effect, as did other employees. Their testimony was to the effect that shortly before the collision Tolliver was loaned the use of one of Yantis-Harper's cars for the sole purpose of permitting Tolliver to go to his own home to get a raincoat which

he wanted for his own use because it was raining, and that the use of the car had no relation whatever to any service performed for Yantis-Harper or in connection with their business by Tolliver, and had no relation to any duty on Tolliver's part as an employee, and that, indeed, he was not an employee at all on that day." The court, in commenting on this testimony, said: "There are contradictions in the testimony of these witnesses, which prevent us from so holding, as a matter of law, and we are unable also to say, as a matter of law, that no bias on their part was shown. In the case of **Skillern** v. **Baker,** 82, Ark. 86, 100 S. W. 764, 765, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, Mr. Justice Riddick said: 'It may be said to be the general rule that where an unimpeached witness testified distinctly and positively to a fact, and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and, where the witness is interested in the result of the suit or facts are shown that might bias his testimony, or, from which an inference may be drawn unfavorable to his testimony, or against the fact testified to by him, then the case should go to the jury.' "

In the case at bar there is no contradiction of Warner's testimony, nor is it susceptible of any other inference, that his sole object in using the defendant's car was to return from the place where he had been playing golf to the boat on which he was the chief engineer. The **Casteel** case is essentially different in its facts from the instant case and therefore is not a precedent which supports the plaintiffs' argument.

In **Ackerson** v. **Jennings Co.,** 107 Conn. 393, also cited by the plaintiffs, the defendant was in the business of selling, repairing and rendering service for automobiles, having its main establishment in Bridgeport and branches in several

Connecticut cities, including one in Stamford. One Wilcox was general manager of the Stamford branch and as such had direct supervision of the conduct of the business of that branch, including the sale and service of cars and general control of defendant's employees connected therewith. One Root was service manager at the Stamford branch, having charge of all repair work, of the stock room and of the servicing of cars, and had direct supervision of the men employed in that department. Root's immediate superior, from whom he took orders, was Wilcox. On December 24, 1926, each of the employees of the Stamford branch received an invitation, written on the stationery of the defendant company and signed by Wilcox, reading as follows: "You are cordially invited to be my guest at a dinner to be held on the evening of January 8th, 1927, as a token of my appreciation of your services rendered for the company and myself." At an appointed hour most of the employees met at the office and were transported in two cars belonging to the defendant, and driven by Wilcox and Root to an inn, some distance away, where dinner was served. Root testified that Wilcox asked him to take a car and transport two of the men in his department and said that he (Wilcox) would transport the others. At the conclusion of the dinner Root took the same two men into the same car in which he had taken them to the dinner and while on the return journey the car, through the negligence of Root, left the road and collided with two poles, as a result of which Ackerson, one of the men riding with him, was killed and the other, Hunt, seriously injured. At the dinner Wilcox made a speech regarding the desirability of closer relations and consultation between the employees and himself, urging them that if any had grievances they should talk them over with him instead of keeping them to themselves. Wilcox testified that he gave the dinner on his own initiative and at his own expense to show his appreciation of

a Christmas gift that had been given to him by the employees. Speaking of the effect of this testimony the court said (pp. 397,398): "We think, however, in view of the statement of the purpose contained in the invitation and the above mentioned discussion at the dinner, that the jury might reasonably have found that the occasion was intended principally if not solely to promote legitimate and important interests of the defendant's business, viz., harmony, cooperation, and good will among the employees of the Stamford branch and between them and Wilcox as defendant's representative, and within the scope and implied authority of Wilcox, as its manager, acting in behalf of the defendant. Any secret intention of Wilcox which none of the employees knew or inferred could not be held to characterize the purposes of this occasion * * * If Wilcox had, at the time and place, instructed Root to take one of defendant's cars and go to the relief of a disabled automobile out upon the road, no question could be made as to defendant's liability for consequences of Root's negligence while so engaged. If, as we think, the jury might have found, not unreasonably, if they believed all the testimony adduced by the plaintiffs, and adopted the inferences properly to be drawn therefrom, the trip upon which Root was engaged was, perhaps not so obviously but none the less truly, in the same category, a like result would follow. If, on the other hand, the jury concluded that the expedition was a personal entertainment by Wilcox, of the the employees of the company as his guests in return for the present which had been made to him and that such references as were made to the conduct of the business of the company were merely incidental and such as would naturally be discussed in a meeting of its employees, the occasion would not be within the apparent scope of Wilcox's authority as representing the defendant, and it would not be liable."

It is apparent that there is a material, factual difference

between this case and the case at bar. If Burns had directed Warner to use the defendant's car as a means of transporting him to some place on the Island of Maui, where he was to participate in an enterprise instigated by Burns for the defendant's benefit, and, after the completion of the enterprise, Warner had used the car to return to the boat and in doing so had negligently killed plaintiff's father, the cited case might be applicable. There is not a scintilla of evidence, however, to establish any such situation. Warner, according to the undisputed testimony introduced by the plaintiffs themselves, had, by some means not disclosed by the evidence, gone from the boat to a place on Maui to play golf, an enterprise wholly unconnected with the defendant's business. When he was ready to return to the boat Burns authorized him to use the defendant's car for that purpose and that purpose alone.

In the **Ackerson** case, as we have just noticed, the court was of the opinion that if the dinner was given by Wilcox to the defendant's employees for the purpose of showing his appreciation of the gift they had made him and the references by him in his speech to the company's business were merely incidental the defendant would not be liable for the negligence of Root which caused the death of Ackerson and the injury to Hunt. Under this principle it was not within the scope of Burn's agency to authorize Warner to use the defendant's car for the purpose of returning from an undertaking in which the defendant had no concern and from which it derived no benefit but which was solely for Warner's own pleasure and benefit.

Our attention is also called to **d'Aleria v. Shirey**, 286 Fed. 523, which was decided by the ninth circuit court of appeals. The defendant, together with Armand d'Aleria (to whom she was not at that time married, but to whom she was subsequently married), arrived at a hotel in San Francisco at eleven o'clock at night in an automobile, the

property of the defendant. The defendant went into the hotel and left d'Aleria to take the automobile to the garage where it was usually kept. Twenty minutes later a collision occurred while the automobile was being driven by d'Aleria and as a result the plaintiffs were injured. d'Aleria, who was called by the defendant and who was the only witness as to what occurred from the time he left the hotel until the accident, testified that the defendant told him to take the automobile to the garage and that he replied that he would first call at a certain music store to see the music publisher and that he did make the call and that thereafter he picked up a friend whom he intended to take to the Fairmont Hotel, and that while he was about to do so the accident occurred. The defendant moved for an instructed verdict in her favor, which was denied. The trial resulted in a verdict and judgment for plaintiffs. On Appeal the only assignment of error was the refusal of the court below to grant the motion for an instructed verdict. The appellate court held that there was no error. In giving its reasons for this conclusion the court said: "The plaintiff in error relies upon the doctrine that for a negligent act done by a servant the master is not liable, unless the act was done at a time when the servant was engaged in his master's business. The evidence sufficiently shows that d'Aleria, although not engaged as a chauffeur by the plaintiff in error, sustained such relation to her that, in returning the automobile to the garage, he acted as her servant. He had been employed by her as a musician. He had, as the evidence clearly indicates, acted as her agent in going to the garage to get the automobile for her, and driving it for her, and in returning it to the garage after she had used it. He had no means with which to respond in damages, and it is obvious that both he and she had every incentive to relieve her from responsibility for the results of the accident. Prima facie, the plaintiff in error was liable for the negligent act

of d'Aleria, for the collision occured from the negligent driving of an automobile belonging to the plaintiff in error, and driven by her servant. The jury were not bound to believe all the testimony that was offered on behalf of the plaintiff in error to overcome that presumption. As to the instructions under which the automobile was placed in the charge of the driver, the testimony of the two parties who alone knew of the facts differed. What was done with the automobile, during the ensuing twenty minutes, the driver alone knew. The jury were not bound to believe that he picked up a friend en route or that, if he did, he intended to go elsewhere than to the garage. There was no corroboration of the driver's testimony by the person who, he said, was with him at the time of the accident ,and there is nothing in the record to corroborate the driver's evidence that such a person was with him at that time. The jury may have believed that the errand of d'Aleria to a music store on Market street was an errand on behalf of the plaintiff in error. She did not testify that it was not. If a servant, while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable."

Again we have such a dissimilarity in facts as to render the cited case inapposite. In the **d'Aleria** case the plaintiffs were in a position to challenge the truth of Armand d'Aleria's testimony and to ask the jury, for obvious reasons, to disbelieve it. The plaintiffs in the instant case are in no such position. The evidence introduced by them, which was uncontradicted, inferentially or otherwise, proves conclusively that the only purpose for which Warner was using the defendant's car was to return from the pursuit of his own pleasure to the defendant's boat, where his activities as the defendant's employee were to be resumed.

Plaintiffs cite many other cases which we think are likewise inapplicable to the case before us.

This case presents the naked question of whether the negligence of an employee of a corporation, in the operation of an automobile, the property of the corporation, which was furnished him by the general agent of the corporation for the sole purpose of returning from a personal enterprise, in which he had been engaged, to the place of his employment, where there was no emergent need of his services, is imputable to the corporation. We know of no judicial precedent requiring an affirmative answer to this question. Warner was no more acting for the defendant on his return from the golf links to the boat than he was acting for it while going from the boat to the golf links. In the one instance he was leaving the scene of his employment and going in search of personal recreation and pleasure, and in the other he was returning to his employment. In both instances he was acting in a personal and not in a representative capacity. Nor does it make any difference that in the latter instance the car that he used was furnished him by the defendant's agent on Maui. This agent had no more power within the limits of his agency to involve the defendant in Warner's negligence by authorizing him to use its car for the purpose of returning to the boat than he had to so involve it if he had authorized its use by Warner for the purpose of going to the golf links.

For the foregoing reasons it is our conclusion that the defendant's motion for a directed verdict was properly granted. The judgment therefore is affirmed.

A. W. A. Cowan (ULRICH & HITE on the briefs) for plaintiffs in error.

(S) ANTONIO PERRY
(S) JAS. J. BANKS
(S) CHARLES F. PARSONS

C. A. Gregory (Smith & Wild, Smith, Warren, Stanley & Vitousek and W. B. Pittman on the brief) for defendant in error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE, PRESIDING

JUDGMENT ON WRIT OF ERROR

Received and filed
in the Supreme Court
Dec. 29, 1931
AT 2:32 o'clock P. M.
(S) ROBERT PARKER, JR.
Assistant Clerk

Approved as to form
(S) ULRICH & HITE

SMITH & WILD
McCandless Bldg.,
Honolulu, T. H.
Attorneys for Defendant-
Defendant-In Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

JUDGMENT ON WRIT OF ERROR

In the above entitled cause, pursuant to the opinion of the above entitled court rendered and filed on the 8th day of December, 1931, the judgment of the Circuit Court is affirmed.

The cost of the Supreme Court amounting to $17.75 are taxed against the Plaintiff, Plaintiffs-in-Error herein and Plaintiffs below.

DATED: Honolulu, T. H., this 29 day of December, 1931.

BY THE COURT
(S) Robert Parker, Jr.
Assistant Clerk, Supreme Court.

(SEAL)

APPROVED:
(S) ANTONIO PERRY,
Chief Justice, Supreme Court,
Territory of Hawaii.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE, PRESIDING

PETITION FOR APPEAL
and
AFFIDAVIT OF A. W. A. COWAN

Filed March 22, 1932
At 10:10 o'clock A. M.
Robert Parker, Jr.
Clerk Supreme Court.

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.

Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE, PRESIDING

PETITION FOR APPEAL

To the Honoroble Chief Justice and associate Justices of the Supreme Court of the Territory of Hawaii:

Come now TIMOTEO ANGCO and CIPRIANO ANGCO, Minnors, by VICTOR FERIL ANGCO, their uncle and next friend, plaintiffs-plaintiffs-in-error, by their attorneys, Ulrich & Hite, deeming themselves aggrieved by the decision and judgment in the above entitled cause of affirming the judgment of the Circuit Court of the First Judicial Circiut, Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii, was made and entered on, to-wit, the 29th day of December, 1931, pursuant to the decision and opinion of said Court rendered December 8, 1931, and claiming that there are manifest and material errors to the damage of said plaintiffs-plaintiffs-in-error, appellants, in said cause, which errors are specificially set forth in the Assignment of Errors filed herewith, to which reference is hereby made, and respectfully pray that an appeal may be allowed them in the above entitled cause, and that they be

allowed to prosecute said appeal to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the statutes in such cases made and provided; that an Order be made fixing the amount of security the plaintiffs-plaintiffs-in-error shall give, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record proceedings, exhibits, pleadings and papers in this cause, duly authenticated, for the correction of the errors as complained of, and that a Citation may issue.

And in this behalf plaintiffs-plaintiffs-in-error, appellants, say that the said judgment was rendered in an action at law, and that the value in controversy in said action, exclusive of interest and costs, exceeds $5,000.

Dated: Honolulu, T. H. March 21, 1932.

ULRICH & HITE,
By: A. W. A. COWAN
Attorneys for TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,
Petitioning for Appeal herein.

TERRITORY OF HAWAII,) -SS-
City and County of Honolulu.)

A.W.A. COWAN, being first duly sworn, on oath desposes and says that he is an attorney at law, associated with the law firm of Ulrich & Hite, with its offices in the Dillingham Building, Honolulu, Hawaii, and that he is now and has been one of the attorneys of record in the above entitled cause throughout the various proceedings which have transpired in said cause in this Court and in the court below, and that he is familiar with the subject matter of the said litigation, and affiant further says that he has authority to make oath on behalf of TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, the parties to said litigation now petitioning for appeal herein.

Affiant says that by the order and judgment of the Honorable A. M. Cristy, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, made and entered on, to-wit, March 3, 1931, it was ordered and adjudged that the plaintiffs have and recover nothing by way of damages in the suit previously instituted by them against THE STANDARD OIL COMPANY OF CALIFORNIA, defendant-defendant-in-error herein.

Affiant says that upon appeal taken, by judgment entered in this the above entitled Court in said matter on, to-wit, the 8th day of December, 1931, the rendition and entry of which judgment is assigned as error herein, the said judgment of the Circuit Court has been affirmed, and it has been adjudged by said Supreme Court that the plaintiffs recover nothing by way of damages from the defendant-defendant-in-error herein, and your affiant says that the amount involved in the prosecution of this appeal in said cause is an amount greatly in excess of $5,000,00, exclusive of costs and interest, all as more fully appears from the records in said cause.

This affidavit is made in support of the foregoing petition for the allowance of an appeal, and affiant further says that he has read said petition for appeal, knows the contents thereof, and that the allegations therein contained are true.

A. W. A. COWAN

Subscribed and sworn to before me this
19th day of March, 1932.

[S E A L] KATHRYN R. CONNOR
Notary Public, First Judicial Circuit,
Territory of Hawaii

Service of the within PETITION FOR APPEAL and AFFIDAVIT OF A. W. A. COWAN and receipt of a copy is hereby admitted this 21st day of March, 1932.

SMITH & WILD,
By C. A. Gregory 3/19/32
Attorneys for Defendant-
Defendant-in-Error.

W. B. Pittman
(W. B. Pittman) Attorney for Defendant-
Defendant-in-Error.

SMITH, WARREN, STANLEY & VITOUSEK
By R. A. Vitousek
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ASSIGNMENT OF ERRORS

Filed March 22, 1932
At 10:10 o'clock A. M.
ROBERT PARKER, Jr.
Clerk Supreme Court.

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.
Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ASSIGNMENTS OF ERROR

Now come TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, plaintiffs-plaintiffs-in-error in the above entitled cause, and say that in the record, proceedings, opinion and judgment of the above entitled cause in the Supreme Court of the Territory of Hawaii, there is manifest error to the prejudice of said plaintiffs-plaintiffs-in-error, appellants, in that, to-wit:

I.

The Supreme Court of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, for the reason that said judgment was contrary to the law, contrary to the evidence and contrary to the weight of the evidence.

II.

The Supreme Court of the Territory of Hawaii erred in ruling that the trial judge did not have the right to instruct the jury that they could find that the automobile belonging to the Standard Oil Company of California was used by the Engineer Warner to shorten the time of his recess and thus lengthen the time of his employment, thus refusing to apply the rule that on a motion for a directed verdict, all the evidence, together with the inferences fairly to be drawn therefrom, must be viewed in the light most favorable to the party resisting the motion.

III.

The Supreme Court of the Territory of Hawaii erred in ruling that there was no evidence, more than a mere scintilla, before the jury on which to base a finding by that jury that the defendant Company's automobile was used as a reasonable means of meeting an emergency or sudden necessity having to do with the conduct of the defendant Company's business.

IV.

The Supreme Court of the Territory of Hawaii erred in ruling that the facts alleged in plaintiff's offer of proof, being in substance as follows:

(a) That one Burns was the General Manager and the regular representative of the Standard Oil Company of California on the Island of Maui, and that it constituted a part of his duties to facilitate the passage of Company boats to and from the Island of Maui;

(b) That said Burns authorized the Engineer Warner to use the Company's car for the purpose of transporting both Warner and the Captain of the boat to the harbor in order that they might assume their duties on the Standard Oil tanker "LUBRICO";

(c) That it was in the interest of and for the benefit of

the Company that the Captain and the Chief Engineer be on their boat an appreciable interval before the time set for sailing—

failed to present, together with all the evidence and inferences therefrom in the record, a proper case for the jury.

V.

The Supreme Court of the Territory of Hawaii erred in ruling that the nature of the Engineer Warner's general employment must control the case, and not the particular use to which the Company's car was put on the particular occasion, regardless of the nature of its operator's general employment, and erred accordingly in viewing the case as one calling for the strict application of the law of Agency and not as one involving primarily the law of Automobiles.

WHEREFORE the plaintiffs-plaintiffs-in-error pray that the decision and judgment of the Supreme Court of the Territory of Hawaii be reversed, and that said Supreme Court be ordered to enter an order reversing the judgment of the Circuit of the First Judicial Circuit of the Territory of Hawaii, and ordering that the case be remanded for a new trial.

Dated at Honolulu, T. H., this 21 day of March, 1932.

ULRICH & HITE,
By A. W. A. COWAN,
BY BARRY S. ULRICH.
Attorneys for Plaintiffs-Plaintiffs-in-Error.

Service of the within ASSIGNMENT OF ERRORS and receipt of a copy is hereby admitted this 21 day of March, 1932.

SMITH & WILD
By C. A. GREGORY 3/19/32.
Attorneys for Defendant-Defendant-in-Error.

W. B. PITTMAN
Attorney for Defendant-Defendant-in-Error.

SMITH, WARREN, STANLEY & VITOUSEK,
By R. A. VITOUSEK
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND

Filed March 22, 1932

At 10:10 o'clock A. M.

ROBERT PARKER, Jr.
Clerk Supreme Court

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.

Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND

Upon reading and filing the petition for appeal and assignment of error presented to this Court by TIMOTEO ANGCO. and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, plaintiffs-plaintiffs-in-error appellants, in which they pray that an appeal may be allowed them to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on, to-wit, the 29th day of December, 1931, pursuant to the opinion and decision filed and rendered on the 8th day of December, 1931 in the above entitled cause, wherein it is alleged that manifest error has occurred, now to the end that said errors, if any there be, may be speedily corrected and justice done in the premises.

IT IS ORDERED that the said appeal to the United

States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby allowed, and the said plaintiffs-plaintiffs-in-error appellants, are ordered to file with the Clerk of this Court an approved bond in the sum of TWO HUNDRED FIFTY DOLLARS ($250.00) conditioned that they will prosecute said appeal to conclusion and effect and answer all proper damages and taxable costs if they fail to make good their said appeal.

Dated at Honolulu this 21st day of March, 1932.

[SEAL] ANTONIO PERRY,
Chief Justice
Supreme Court of the Territory of Hawaii.

Service of the within ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND and receipt of a copy is hereby admitted this 21 day of March, 1932.

SMITH & WILD
By C. A. GREGORY 3/19/32
Attorneys for Defendant-Defendant-in-Error.

W. B. PITTMAN
W. B. Pitmann, Attorney for Defendant-Defendant-in-Error.

By R. A. VITOUSEK
By R. A. VITOUSEK
SMITH, WARREN, STANLEY & VITOUSEK,
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

CITATION ON APPEAL

Filed March 22, 1932
At 10:10 o'clock A. M.
ROBERT PARKER, Jr.
Clerk Supreme Court.

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.
Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

CITATION ON APPEAL

THE UNITED STATES OF AMERICA, SS.
THE PRESIDENT OF THE UNITED STATES OF AMERICA to THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, appellee:

GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to a petition for appeal duly allowed and filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii from the decision and judgment of the Supreme Court of the Territory of Hawaii in said cause, wherein TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VIC-

TOR FERIL ANGCO, their uncle and next friend, are plaintiffs-plaintiffs-in-error appellants and you are defendant-defendant-in-error appellee, to show cause, if any there may be, why said decision and judgment should not be corrected and speedy judgment should not be done to the parties in that behalf.

WITNESS THE HAND AND SEAL of the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America this 21st day of March in the year of our Lord 1932.

[SEAL] ANTONIO PERRY,
Chief Justice of the Supreme Court of the
Territory of Hawa

ATTEST:
ROBERT PARKER, Jr.
Clerk
Supreme Court of the Territory of Hawaii

Service of the within CITATION ON APPEAL
and receipt of a copy is hereby admitted this
21 day of March, 1932.

SMITH & WILD
By C. A. GREGORY 3/19/32
Attorneys for Defendant-Defendant-in-Error.

W. B. PITTMAN
Attorney for Defendant-Defendant-in-Error.

SMITH, WARREN, STANLEY & VITOUSEK
By R. A. VITOUSEK
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

BOND ON APPEAL

Filed March 22, 1932
At 3:30 o'clock P. M.
(S) ROBERT PARKER, Jr.
Clerk Supreme Court

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.
Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS that TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, as principals, and the UNITED STATES FIDELITY & GUARANTEE COMPANY, as surety, are held and firmly bound unto THE STANDARD OIL COMPAND OF CALIFORNIA, a corporation, in the penal sum of TWO HUNDRED FIFTY DOLLARS ($250.00) for the payment of which, well and truly to be made to the said THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, its successors and assigns, the said TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, as principals, and the UNITED STATES FIDELITY & GUARANTY COMPANY as surety, by these presents do bind themselves, their respective successors and heirs, executors and assigns, jointly and severally and firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT:

WHEREAS, on the 22 day of March, 1932, the above bounded principals filed their petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decisions and judgment made and entered in the above entitled cause by the Supreme Court of the Territory of Hawaii;

NOW, THEREFORE, if the said principals shall prosecute their appeal with effect and answer all damages and taxable costs if they fail to sustain said appeal, then this obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said principals have signed their names and seal, and said surety has affixed its corporate seal and its signature by its proper officers thereunto duly athorized this the 22 day of March, 1932.

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,

By (S) Victor Feril Angco (Principals)
[SEAL]

UNITED STATES FIDELITY & GUARANTEE COMPANY,

By (S) Herman Luis [SEAL]
Surety
Its Attorney in Fact

Approved as to amount of Bond and sufficiency of surety, this 22nd day of March, 1932,

(S) ANTONIO PERRY, [SEAL]
Chief Justice,

Supreme Court,
Ter. of Hawaii

Service of the within BOND ON APPEAL and receipt of a copy is hereby admitted this 21 day of March, 1932.

SMITH & WILD,

By (S) C. A. GREGORY 3/19/32
Attorneys for Defendant-Defendant-in-Error.

(S) W. B. PITTMAN
(W. B. PITTMAN) Attorney for Defendant-Defendant-in-Error.

SMITH, WARREN, STANLEY & VITOUSEK,
By (S) R. A. Vitousek
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

Filed March 22, 1932

At 10:10 o'clock A. M

ROBERT PARKER, Jr.
Clerk Supreme Court.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

On application of Appellants, and just cause appearing therefor,

IT IS HEREBY ORDERED that Appellants and the Clerk of this Court be and they are hereby allowed until and including the 21 day of April, 1932, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record of the above entitled cause on appeal, together with the Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Citation and Bond on Appeal therewith, and all other papers required as part of said record.

Dated at Honolulu, T. H., 21, 1932.

[SEAL] ANTONIO PERRY,

Chief Justice
Supreme Court of the Territory of Hawaii

APPROVED:

SMITH & WILD
By C. A. GREGORY
Attorneys for Defendant-Defendant-in-Error.

W. B. PITTMAN
(W. B. Pittman)
Attorney for Defendant-Defendant-in-Error.

SMITH, WARREN, STANLEY & VITOUSEK,

By (S) R. A. VITOUSEK
Attorneys for Defendant-Defendant-in-Error.

Service of the within ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL and receipt of a copy is hereby admitted this 21st day of March, 1932.

SMITH & WILD
By C. A. GREGORY 3/19/32
Attorneys for Defendant-Defendant-in-Error.

W. B. PITTMAN
(W. B. Pittman)
Attorney for Defendant-Defendant-in-Error.
SMITH, WARREN, STANLEY & VITOUSEK
By R. A. VITOUSEK
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

PRAECIPE

Filed March 22, 1932,
At 10:10 o'clock A. M.
(S) ROBERT PARKER, Jr.
Clerk Supreme Court.

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.

Attorneys for
Plaintiffs-Plaintiffs-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

PRAECIPE

To ROBERT PARKER, Jr., Esquire, Clerk of the Supreme Court, Territory of Hawaii:

YOU WILL PLEASE prepare a transcript of record in the above entitled cause to be filed in the Office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to include in said transcript the following:

1. Complaint, Motion for Appointment of next friend, Order on motion, and Summons dated November 19, 1930;
2. Defendant's answer, dated December 8, 1930;
3. Demand for jury trial, dated December 11, 1930;
4. Judgment dated March 3, 1931;

5. Writ of error, dated July 8, 1931;
6. Decision of the Supreme Court of the Territory of Hawaii, dated December 8, 1931;
7. Judgment on writ of error, dated December 29, 1931;
8. Petition for appeal and affidavit of A.W.A. Cowan, dated March 21, 1932;

Amended Mch. 29 32. A.P.

9a. Assignments of Error. (A.W.A.C.)
10. Order allowing appeal and fixing amount of bond, dated March 21, 1932;
11. Citation on appeal, dated March 21, 1932;
12. Bond on appeal, dated March 21, 1932;
13. Statement of the evidence;
14. Order extending time to transmit record on appeal, dated March 21, 1932;
15. Copy of this praecipe;
16. All orders enlarging time to docket cause.

You will annex to and transmit with the record the original petition for appeal, assignment of errors, order allowing appeal and citation with return service, and also your certificate under seal, stating in detail the costs of the record and by whom the same was paid.

Dated: Honolulu, T. H., March 21, 1932.

TIMOTEO ANGCO and CIPRIANO ANGCO, by VICTOR FERIL ANGCO, their uncle and next friend,

ULRICH & HITE
By (S) A. W. A. COWAN
Their Attorneys.

Service of the within PRAECIPE and receipt of a copy is hereby admitted this 21st day of March, 1932.

SMITH & WILD,

By (S) C. A. GREGORY 3/19/32
Attorneys for Defendant-Defendant-in-Error

(S) W. B. PITTMAN
Attorneys for Defendant-Defendant-in-Error

SMITH, WARREN, STANLEY & VITOUSEK,
By (S) R. A. VITOUSEK

Attorneys for Defendant-Defendant-in-Error

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

Filed April 23, 1932

At 9:10 o'clock A. M.

ROBERT PARKER, Jr.
Clerk Supreme Court.

By ULRICH & HITE,
430 Dilliingham Building
Honolulu, T. H.
Attorneys for Plaintiffs-Plaintiffs-in-Error.

SMITH & WILD, W. B. PITTMAN, and SMITH, WARREN, STANLEY & VITOUSEK, Honolulu,
Attorneys for Defendant-Defendant-in-Error.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

On application of Appellants, and just cause appearing therefore,

IT IS HEREBY ORDERED that Appellants and the Clerk of this Court be and they are hereby allowed until and including the 29th day of May, 1932, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record of the above entitled cause on appeal, together with the Petition for Appeal, Assignment of Errors, Order allowing appeal, Citation and Bond on Appeal therewith, and all other papers required as part of said record.

A. P. Dated at Honolulu, T. H., April 23, 1932.

[SEAL] ANTONIO PERRY,
Chief Justice
Supreme Court of the Territory of Hawaii

Copies of the foregoing Order served upon attorneys for Defendant-Defendant-in-Error by mail this 23rd day of April, A. D., 1932.

A.W.A.C. ULRICH & HITE
By A. W. A. COWAN

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Appellants, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,	Defendant-appellee. APPEAL FROM SUPREME COURT OF THE TERRITORY OF HAWAII

SECOND REVISED STATEMENT OF EVIDENCE

Filed April 16, 1932

At 8:40 o'clock A. M.

ROBERT PARKER, Jr.
Clerk Supreme Court.

ULRICH & HITE
430 Dillingham Building
Honolulu, T. H.
Attorneys for Plaintiffs-Appelants

SMITH & WILD, W. B. PITTMAN, and
SMITH, WARREN, STANLEY & VITOUSEK
Honolulu, T. H.
Attorneys for Defendant-Appelee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Appellants, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-appellee.	APPEAL FROM SUPREME COURT OF THE TERRITORY OF HAWAII

SECOND REVISED STATEMENT OF EVIDENCE

This is an action brought on behalf of Timoteo Angco and Cipriano Angco, minors, by Victor Feril Angco, their uncle and next friend, against the Standard Oil Company of California, a corporation. The action is for damages arising out of the death of the father of the plaintiffs, Felix Angco, upon whom they claim they were dependent for support.

The father of the plaintiffs was killed while standing off the public highway, together with several other Filipinos, beside a parked Ford truck, on the Island of Maui between Paia and the harbor at Kahului, at a place about three miles from Paia and about five miles from Kahului Harbor. Felix Angco and another Filipino were killed and a third person injured when a Willys-Knight roadster, admittedly the property of the Standard Oil Company of California, and driven by Reginald Warner, chief engineer of the Standard Oil Company tanker LUBRICO, then anchored in the harbor at Kahului, struck them down. Warner was accompanied by one Daniels, who was the captain of the tanker LUBRICO. When the accident occurred, the two officers of the boat were

returning to the steamer from the home of C. D. Burns at Paia. In this connection the following evidence was adduced at the trial: (Direct examination of George H. Cummings, Deputy Sheriff, Island of Maui.)

"A. The Willys-Knight was jammed up against the tree, the radiator was jammed in, the fenders bent and headlights were out of order. The truck at the hind, the right end, extreme end, was a dent as if it had been struck by something.

"Q. Assuming that the truck was facing that way, would it be on this side or that side?

"A. That side, the extreme right end.

"Q. Did you make any memorandum or take any notes as to the numbers of those cars at that time? Did you make any investigation with a view to ascertaining to whom the automobiles belong?

"A. I found out that the Maui Dry Goods Company owned the truck and the Willys-Knight was a car used by Mr. Burns, manager of the Standard Oil Company."

"Q. Did he tell you where he was going at the time of the accident?

MR. WILD: Objected to as calling for hearsay, and no statements made by the agent can be binding upon the company, not even to establish the fact as to who was driving the car at the time of the accident, and further there is no basis for impeachment, and it is incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

MR. WILD: Exception.

A. He told me he took the car from Mr. Burns' house to go back to the Standard Oil Company boat "Lubrico".

Q. Did he tell you they were going to the boat?

MR. WILD: Objected to as leading and suggestive.

THE COURT: Objection overruled.

Mr. Wild: Exception.

A Yes. They told me they took the car from Mr. Burns' garage to go back to the Standard Oil Company boat "Lubrico" at Kahului.

Q Did he tell you at the time what time the boat was then to leave, as he understood it?

MR. WILD: Objected to as calling for hearsay.

THE COURT: I think we are getting to the extreme limits of the rule."

The accident occurred on June 16, 1930, between the hours of seven and eight o'clock P. M. Warner, in reply to a question from the Court as to when he was due back on the boat, replied that "he thought to get back about 7:30." Evidence in the record shows that the Willys-Knight roadster was traveling at a great rate of speed, variously described as 45 miles an hour, and "like the wind", etc. Further evidence was adduced showing that the Willys-Knight roadster swerved to the left-hand side of the road going toward Kahului while passing the witness' car, and struck the Ford truck and the deceased with terrific force, the impack being such that the truck, which was facing Kahului, was jammed against a tree and swung completely around so that after the accident it faced toward Paia.

Later, but before this trial, Warner was tried on and acquitted of a charge of manslaughter growing out of this accident. W. B. Pittman, Esquire, who was of counsel for the defendant in the trial below, defended Warner in the manslaughter trial. Mr. W. B. Pittman, associated with other counsel for the defendant Standard Oil Company of California, cross-examined each of the witnesses specifically with regard to what those witnesses had testified to in the criminal trial on Maui.

"Q. Did you go out with the jury when we went out on the criminal case? Did you go out when we examined that tree? Do you remember when the Judge took the jury out?"

The record further disclosed that police officers went

to the LUBRICO for the purpose of placing Warner under arrest on the criminal charge. C. D. Burns, was present on the boat during the negotiations for the release of Warner. Testimony of the arresting officer was adduced to the effect that the captain of the boat told him "he couldn't very well go without his Chief." The officer further testified that he informed the captain that the only man who could help him was the County Attorney, Mr. Bevins, and that the County Attorney came down and then sent for Mr. Walsh, Manager of the Kahului Railroad. After Walsh came down and while Burns was also on the boat, Warner was put under arrest and was allowed to sail accompanied by police officers.

Further evidence was adduced to the effect that the witness, accompanied by officers and by Mr. Burns, asked to meet the captain of the boat, and was introduced to Captain Daniels by Mr. Burns. Later Mr. Warner was called in. Mr. Warner first said that he was riding in the rumble seat of the car in question, and that a man from another boat was driving the car, but upon being told by the witness to "come clean and tell the truth", he confessed that he was at the wheel and that the captain was the only other man in the car. Warner and the captain also told the witness that they got the car at Mr. Burns' house at Paia for the purpose of going back to the Standard Oil Company boat LUBRICO in the harbor at Kahului. Mr. Warner also stated that the accident was "something that might happen to anyone."

Testimony was adduced as follows:

"A I remember all what he told me, he didn't mention anybody, or anything about the children, in fact he was offering to pay the expenses by the Standard Oil Company, he told me —

Mr. WILD: I move to strike the answer out as a voluntary statement, I haven't asked for the conversation.

THE COURT: The witnss is entitled to answer your ques-

tion, Mr. Wild, yes or not and then explain his answer. Motion overruled.

MR. WILD: In this conversation between you and Mr. Burns, he told you that he was perfectly willing to see that the funeral expenses of your brother were paid, but that the Standard Oil Company did not admit any liability?

A He said this way, he said, he is sorry that it happened, but anyhow he conveyed the idea —

MR. WILD: I am not asking you what he conveyed—I am not asking you what he said —

THE COURT: The witness is entitled to tell the conversation to the best of his recollection, you have asked him about it and the witness is entitled to answer.

A Mr. Burns when he came to see me over there, he was telling me he was chasing me, he having received a wireless from the main office that I am here in Maui, he had sent a wireless to Honolulu, 'Of course we are very sorry at what happened, and the Standard Oil, he said, is going to bear all expenses as to his funeral, funeral expenses, and hospital' so we left right there, because the funeral was going to be on, he didn't come out to the house, he was on the other side of the fence, and I was on the other side of the fence, so he left.

Q Didn't Mr. Burns tell you at that same conversation that this offer that he made to pay the funeral expenses was without recognizing any liability at all upon the Standard Oil, or upon Mr. Warner in this accident?

A. I don't remember that.

Q. Do you have any recollection at all in that regard?

A. No.

Q. Do you deny that he told you that?

A. No, I don't remember anything regarding that, I was in a hurry.

Q. Do you deny that Mr. Burns told you that which I have just told you?

A. I remember telling him that I was very thankful when

he said he was going to bear all expenses—

Q Never at any time did you ever tell Mr. Burns that Felix Angco your brother did not have any children living at the time of his death?

A No, that is impossible.

Q You deny that?

A That is impossible, I know that he has children."

Reginald Warner was called as a witness by the plaintiffs and testified: That on July 16, 1930 (the date of the accident), he was employed by the defendant as chief engineer on the steamship LUBRICO, which was at that time anchored at Kahului on the Island of Maui; that he remembered the accident in question and that he was at the time driving the automobile and was going towards the ship. When he was asked the question, "And you were going, were you not, to the steamship LUBRICO," he answered, "We were going towards the steamship. I think we were going to stop and eat in Kahului first." He was then asked if he had not already testified that he was going to the steamship. He answered, "Yes," and then he was asked, "And you were, were you not?" to which he answered, "Not direct. I asked the captain if he wanted to eat, and he said 'when we get down there we will see.'" He was then asked, "And before going to sea you expected to eat in Kahului?" and answered, "Yes," and that aside from this he was on his way to the boat. He was then asked whether his duties on the boat would have to do with whatever the usual duties of the chief engineer are on a steamship, to which he answered, "Yes." He was then asked the following questions, to which he gave the following answers: "Q The boat was going to sea that night? A Yes. Q Captain Daniels was with you at the time? A Yes. Q He is the captain of the boat? A Yes. Q And the boat would go to sea under his command? A From the outside of Kahului harbor." On cross-examination the witness testified that as chief engineer of the

steamship LUBRICO he had no duties on shore at Kahului on the night or afternoon of June 16, 1930; that at the time he was driving the automobile he had not come from performing any duties for the Standard Oil Company and at the time he was driving the car he was not performing any duties for said company; that he was driving down to have a sandwich before going on the boat; that he had been chief engineer for several years and during that time had been in the employment of the defendant. At this juncture the following occurred: "The Court: The court would like to ask a question in view of the line of examination taken, in anticipation of being called upon to make rulings in the matter. When you went ashore did you go ashore in connection with being under orders from anybody having a right to give you orders, or were you on shore that night? A Whenever I go on shore I can go as I please. The Court: Did anyone order you to go ashore in connection with the boat? A No. The Court: In connection with driving the automobile that night did anyone give you any orders in connection with driving the car? A No. The Court: Did anyone give you any orders as to where you should go? A No. The Court: At the time of the accident were you under orders of any superior, orders of anyone on the boat? A No, I just asked him if he wanted to eat. The Court: At the time you got in the car to go back to the boat the captain was with you? A Yes. The Court: Did the captain give you any orders as to returning to the boat and resuming your duties at that particular time? A No, sir. The Court: Were you performing any task or errand on behalf of the captain? A No, sir. The Court: When did you leave the LUBRICO to come ashore? A Between 2:30 and 3 o'clock. Q The Court: At that time were you on any errand connected with the boat? A No, sir, The Court: Were you in company with the captain under his orders to accompany him? A No, sir, I went there mostly with Mr.

Burns to play golf. The Court: A pleasure trip? A Yes. The Court: When were you due back on the boat? A I asked the chief officer when he would be ready to go and he said between 9 and 11, so I thought to get back about 7:30. Mr. Pittman" (for defendant) "Q When you are on shore hs anybody got any power over you at all or can they give you any authority at all? A No, I might respect his position and do a thing or two, but he has no authority. Mr. Pittman: Q Has anybody on the ship any authority over you when you are on land off the ship? A No, sir. * * * Direct examination (continued) by Barry S. Ulrich, Esq." (for plaintiff): "Q It was your duty, was it not, to be back on the boat in time to sail? A Yes. Q And of course you say you are on your own more or less while you are ashore but the agents of the company have the right. have they not, to indicate to you when the boat would sail: that is, if they decided to sail earlier you would have to appear on the boat. I mean the persons in authority were so in authority of that vessel? Mr. Wild: I object as purely speculative. There is no showing that boat changed its schedule that night. They were to sail at 9 and they proceeded back at 7:30. It is purely speculative. (Argument) The Court: The court will assume that a man on the boat if and when notified to return at an earlier time, if he wants to keep his job, would have to come back, but there is no showing there was any call to return earlier. Objection sustained. Q In other words, It was your duty to be on the boat in time to sail? A Yes. (Cross-examination waived.)"

The plaintiffs then offered, and the court received, in evidence an ordinance of the County of Maui relating to speed limits in residence districts. This concluded the testimony. Thereupon the defendant made a motion for a directed verdict, one of the grounds being that the plaintiffs' evidence showed affirmatively that Warner was not acting in the course or scope of his employment or upon the busi-

ness of the defendant at the time of the accident. Before the motion was acted upon the plaintiffs (through counsel) moved that the court reopen their case and permit them to put on further evidence.

The proceedings had on the motion to reopen are incorporated herein verbatim from the transcript of testimony as follows:

"MR. ULRICH: It will be considered that this made in the presence of the jury?

THE COURT: Surely.

MR. ULRICH: On behalf of the plaintiff at this time I move that the Court reopen plaintiffs' case and permit the plaintiff to put on further evidence, particularly with reference to the authorization by the agent Burns given to the engineer Warner to drive the car to the boat; further, with reference to the general authority and powers and duties of the said Burns as the agent and representative of the defendant, Standard Oil Company on the Island of Maui and Territory of Hawaii.

THE COURT: Will you be more specific as to what the evidence is.

MR. ULRICH: We offer to prove by Mr. Burns that he did authorize Mr. Warner to take the car for the purpose of driving himself and the captain down to resume their duties on the boat. We offer to show that at first he said he would take them down himself, but later said he had a social engagement and they should take the car and leave it at the wharf and he would pick it up there later. We offer to prove Mr. Burns was the agent and representative of the Standard Oil Company on the Island of Maui, with general authority to attend to all the necessary details of the business of that company on the Island of Maui having to do with the conduct of the business with reference to the disposition of merchandise on Maui and with reference to the necessary details concerning the dispatch of the compa-

ny's business.

MR. WILD: I object to the reopening of the case, because at the conclusion of the plaintiff's case I asked if they had completed the case and they said they had, and then we rested. It places us in a position where we cannot reopen and we cannot reopen if the Court refused to direct a verdict as directed, and at the conclusion of the case where all the evidence is in and the defendant has rested the case is concluded now. There is no new thing. We had Mr. Burns down from Maui at the request of plaintiffs' counsel ready to answer any questions they wanted to ask of him, and he went home yesterday afternoon, because he has to get his accounts out for this month. They have shown no lack of evidence concerning this evidence at the time we had our hearings before. It appears affirmatively that if they wanted to they would have had Mr. Burns' evidence if they wanted it, and it seems to me a court of law is not a place to go on a fishing expedition. You put on your evidence and rest and then the other side rests and then you make a motion and then you ask to reopen. There is no showing that there was a lack of knowledge at the time of the trial, and we contend your Honor is without power to reopen. Second, if your Honor did reopen and took in the evidence on the very statement counsel has made, that evidence would not change your Honor's ruling in regard to the directed verdict.

MR. ULRICH: It is merely a question of preserving the record.

THE COURT: I do not understand you are ready to prove that there was any emergency existing at the time and place in question which made it imperative to use a company's car, rather than some other means of transportation, to meet the emergency of the company.

MR. ULRICH: We propose to show facts which will present a question to the jury as to whether there was an

emergency.

THE COURT: What facts? I think the Court is entitled to get the facts you intend to present to the jury which might raise a presumption of emergency.

MR. ULRICH: The fact that it was 6:30 in the evening; the fact that the boat was leaving that night, as they understood at the time, between 9 and 10 or 11 o'clock; the fact there were duties for the captain and engineer to perform on the boat before the boat left; the fact that they were at a distance, several miles —

THE COURT: More than five miles?

MR. ULRICH: I don't know.

MR. PITTMAN: I think about five miles.

THE COURT: The witnesses placed the scene of the accident between two and three miles from Paia.

MR. ULRICH: They were at the Burns' home when they took the car. I think we can say at least five miles, or approximately that, from the boat.

THE COURT: Were telephones accessible?

MR. ULRICH: I don't know what the evidence would show.

THE COURT: What do you think the evidence would show?

MR. ULRICH: I don't propose to show that there might have been other ways of getting them down. In other words, I am not suggesting I will be able to prove this is the only way they could have gotten to the boat, but I do suggest it is a reasonable way.

THE COURT: I understand Mr. Burns is a distributing and sales agent of the Company in Maui?

MR. ULRICH: I will show that he is regular representative of the Standard Oil Company on Maui.

THE COURT: Has he any duties in connection with the boat?

MR. ULRICH: I believe we can show it is part of his duties to take such reasonable means as necessary for the

expediting of the boat. I don't know what his contract of employment is, but I think it is reasonable to suggest that his contract of employment is that of agent and representative of the Standard Oil Company on Maui to forward the interests of the company, there whether having to do with the boats or anything else.

THE COURT: The Court will permit you to do this, to go and interview Mr. Burns, accompanied by counsel for the defendant.

MR. WILD: He went home last night.

THE COURT: I understand from the facts disclosed that the man concerned, Mr. Burns, has been in attendance on the Court and has gone back to his employment on Maui.

MR. ULRICH: We have a record of the testimony, so far as the lending of the car is concerned, taken at the other trials, and so far as his duties are concerned, we can call another officer of the Standard Oil Company.

THE COURT: With Burns missing and absent without any fault on the part of the defendant, what witness are you intending to offer?

MR. ULRICH: I should call the Captain. I have the testimony.

THE COURT: Let's see the testimony.

MR. ULRICH: As to the scope of the employment I would have to call some officer of the Standard Oil Company here.

THE COURT: Who?

MR. ULRICH: Whoever is the representative of the Standard Oil Company.

THE COURT: The Court will permit you to go with counsel for the defendant and find that officer and check up on the matter. Anybody here whom Mr. Ulrich wants to interview?

MR. PITTMAN: I will go down and bring you up an officer.

MR. WILD: We have no objection to his interviewing any official of the company he wishes. Mr. Campbell I think would be the one.

MR. ULRICH: I don't offer to prove that he has any control over the boats. My offer was to prove that he might take such steps and do such things as might be necessary to expedite the movement of the company's boats.

MR. WILD: Well, he has nothing of that kind to do.

THE COURT: Do I understand, Mr. Ulrich, that your request for reopening concerns any effort to prove that Mr. Burns had any supervision over the crew or employees on the boats of the Standard Oil Company?

MR. ULRICH: No.

THE COURT: I understand you do not intend to show that he had any general control or supervision of the boats?

MR. ULRICH: No.

THE COURT: Do you intend to show that he was requested to give any orders in supervision or control over the persons or the boats?

MR. ULRICH: I do not intend to show he had any control over the movements of the men.

THE COURT: Do I understand that your offer means to prove that Mr. Burns in his office as an official of the company was requested to use the company's automobile for any other purpose than the conveyance of the captain and the engineer in returning from their holiday to their duties on the boat?

MR. ULRICH: In this particular instance he authorized the use of the automobile for the company's purposes in getting the men back to the boat.

THE COURT: Was there any other company's business of any kind connected with your offer of proof that Mr. Burns was requested or concerned with furthering than the matter, whatever inference may be drawn from it, of assisting these two men in returning to the boat?

MR. ULRICH: That's all.

MR. WILD: From the offer of proof, as it now appears, it would not change the Court's ruling, and counsel has in everything he contends to be a fact.

MR. ULRICH: If it will be admitted, as a matter of record, that Mr. Burns authorized the use of this car for the purpose of getting the men back to the boat, and further admitted that Mr. Burns is a representative of the Standard Oil Company on Maui.

THE COURT: I understand the extent of opposing counsel's admission is that Mr. Burns is distributing and sales manager of the Standard Oil Company products on the Island of Maui, having no supervision or control over the movement of the boats.

MR. WILD: That is an accurate statement.

THE COURT: And automobile in question, Mr Burns was under no orders or requests on company business other than could be inferred by your argument that the return of the men from their holiday in some way benefitted and expedited the company's affairs as to the boat.

MR. WILD: We will admit that.

THE COURT: Well, then it is not necessary to take the offer, and I deny the motion.

MR. ULRICH: Exception to the denial of the Court to reopen."

The motion to reopen having been denied and the offer of proof having been refused, the court thereupon directed the jury to bring in a verdict for the defendant and against the plaintiffs. Judgment in conformity with this direction was entered and an appeal was taken by plaintiffs to the Supreme Court. The Supreme Court entered judgment affirming the judgment of the trial court. From this judgment of the Supreme Court this appeal is taken.

All the matters contained in the foregoing Statement of Evidence were adduced as evidence, either verbatim or in

substance, in the trial of the cause below.

Dated: Honolulu, T. H., April 16, 1932.

APPROVED:

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend,

Plaintiffs-Appellants,

BY ULRICH & HITE
By A. W. A. COWAN
Their Attorneys

THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Defendant-Appellee,

BY SMITH & WILD,
By _____
Its Attorneys
and
_____
(W. B. Pittman)
Its Attorney,
and
SMITH, WARREN, STANLEY & VITOUSEK,
By _____
Its Attorneys

The foregoing Second Revised Statement of Evidence having been presented to me by the appellant and no objection thereto having been noted by the appellee (save as to materiality and relevancy, as to which no ruling is hereby made), the statement is hereby certified as being true and correct as a statement of the evidence adduced at the trial of the

cause.
Honolulu, April 26, 1932.

ANTONIO PERRY,
Chief Justice,
Supreme Court,
Territory of Hawaii

Service of the within SECOND REVISED STATEMENT OF EVIDENCE and copy there of acknowledged this 16th day of April, A. D., 1932.

SMITH & WILD,
By C. A. GREGORY
Attorneys for Defendant-Appellee.

W. B. PITTMAN
(W. B. Pittman)
Attorney for Defendant-Appellee.

SMITH, WARREN, STANLEY & VITOUSEK,
By C. DUDLEY PRATT
Attorneys for Defendant-Appellee.

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	ERROR TO CIRCUIT COURT FIRST CIRCUIT. HONORABLE A. M. CRISTY, PRESIDING.

CLERK'S CERTIFICATE.

TERRITORY OF HAWAII) SS:
CITY AND COUNTY OF HONOLULU.)

I, ROBERT PARKER, JR., Clerk of the Supreme Court of the Territory of Hawaii, BY VIRTUE OF THE PETITION ON APPEAL filed March 22, 1932, the original whereof is attached to the foregoing record, being pages 38 to 43, both inclusive, and in pursuance to the praecipe filed March 22, 1932, copy whereof is attached to the foregoing transcript, being pages 62 to 64, both inclusive.

DO HEREBY TRANSMIT to the United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record being pages 1 to 37, both inclusive, and pages 55 to 58, both inclusive, and I certify the same to be full, true and correct copies of the pleadings, record, entries, opinion and final judgment which are now on file in the office of the Clerk of the Supreme Court of the Territory of

Hawaii, in the above entitled cause, Number 2031.

I DO FURTHER CERTIFY that the original assignment of errors filed March 22, 1932, being pages 44 to 48, both inclusive, the original order allowing appeal and fixing amount of bond filed March 22, 1932, being pages 49 to 51, both inclusive, the original citation on appeal, filed March 22, 1932, being pages 52 to 54, both inclusive, the original order extending time to April 21, 1932, filed March 22, being pages 59 to 61, both inclusive, the original order extending time to May 29, 1932, filed April 23, 1932, being pages 66 to 67, inclusive and the original second revised statement of evidence, filed April 16, 1932, being pages 68 to 88, both inclusive, of the foregoing record.

I, LASTLY CERTIFY that the cost of the foregoing transcript of record is $44.80, and the said amount has been paid by Messrs. Ulrich & Hite, Attorneys for the appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the SEAL of the [SEAL] Supreme Court of the Territory of Hawaii, at Honolulu City and County of Honolulu, this 2nd day of May, A. D., 1932.

ROBERT PARKER, JR.
Clerk of the Supreme Court of the
Territory of Hawaii

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

On application of Appellants,and just cause appearing therefor,

IT IS HEREBY ORDERED that Appellants and the clerk of this Court be and they are hereby allowed until and including the 29th day of June, 1932, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record of the above entitled cause on appeal, together with the Petition for Appeal, Assignment of Errors, Order allowing appeal, Citation and Bond on appeal therewith, and all other papers required as part of said record.

Dated at Honolulu, T. H., May 24, 1932.

[SEAL]

(SIGNED) ANTONIO PERRY
Chief Justice
Supreme Court of the Territory of Hawaii

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, v. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	WRIT OF ERROR TO JUDGMENT OF THE CIRCUIT COURT, FIRST JUDICIAL COURT AT LAW HON. A. M. CRISTY SECOND JUDGE PRESIDING

ORDER EXTENDING TIME TO TRANSMIT RECORD ON APPEAL

FILED MAY 24, 1932

AT 11:05 O'CLOCK A. M.

ROBERT PARKER Jr.

CLERK SUPREME COURT

NO. 2031

IN THE SUPREME COURT OF THE TERRITORY OF HAWAII

TIMOTEO ANGCO and CIPRIANO ANGCO, Minors, by VICTOR FERIL ANGCO, their uncle and next friend, Plaintiffs-Plaintiffs-in-Error, vs. THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation, Defendant-Defendant-in-Error.	ERROR TO CIRCUIT COURT FIRST CIRCUIT HONORABLE A. M. CRISTY, PRESIDING.

CLERK'S CERTIFICATE.

TERRITORY OF HAWAII)
CITY AND COUNTY OF HONOLULU.) ss:

I, ROBERT PARKER, JR., Clerk of the Supreme Court of the Territory of Hawaii, DO HEREBY CERTIFY that the foregoing is a full, true and the original Order extending time to transmit record on Appeal to the Ninth Circuit Court of Appeals for the Ninth Circuit, filed May 24, 1932, being pages 89 to 90, both inclusive, in the above entitled cause, Number 2031.

IN WITNES WHEREOF, I have hereunto set my hand and affixed the Seal of the above entitled Court, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 24th day of May, A. D. 1932.

ROBERT PARKER JR.
Clerk of the Supreme Court of the Territory of Hawaii.

NO. 6876

United States

Circuit Court of Appeals

For the Ninth Circuit

TIMOTEO ANGCO and CIPRIANO ANGCO, minors, by VICTOR FERIL ANGCO, their uncle and next friend,

Appellants,

vs.

THE STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellees.

BRIEF FOR APPELLANTS UPON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII

BARRY S. ULRICH
CHAS M. HITE
A. W. A. COWAN
Attorneys for Appellants.

SUJECT INDEX

TABLE OF CASES AND AUTHORITIES

BRIEF FOR APPELLANT

I. STATEMENT OF FACTS

At eight o'clock on Sunday evening, June 16, 1930 (Tr. p. 70) a Willys-Knight roadster, belonging to the Standard Oil Company of California, and driven by the Chief Engineer of the Standard Oil Company tanker "Lubrico," struck and killed the father of the plaintiffs herein. The accident occured on the island of Maui, in the Territory of Hawaii, at a point about three miles from Paia and about five miles from Kahului Harbor, where the oil tanker "Lubrico" was anchored. (Tr. p. 68) Accompanying the Chief Engineer, one Warner, was the Captain of the "Lubrico." (Tr. pp. 68-69.) The automobile was being driven at a terrific rate of speed when the accident occurred. (Tr. p. 70.) It was taken from the home of Mr. C. D. Burns, Manager of the Standard Oil Company on the island of Maui (Tr. pp. 68-69), under authorization of Mr. Burns, (Tr. pp. 67, 79) and Mr. Warner was due back on his boat at "about seven-thirty." (Tr. p. 70.) The Engineer Warner had stated that he was on his way to the boat when the accident occurred. (Tr. p. 73.) Later, he attempted to qualify this statement by saying that he had asked the Captain "if he wanted to eat," and that the Captain replied, "When we get down there we will see." (Tr. p. 73)

This conflict in Warner's testimony was never resolved.

After trial had, the judge rejected an offer to prove that the Manager Burns had authorized the use of the automobile for the purpose of transporting the men to their boat, (Tr. p. 76) and peremptorily instructed the jury to bring in a verdict for the defendants, on the short ground that the Engineer Warner was not acting within the

course and scope of his employment, nor doing anything for the benefit of nor at the request of the Company at the time the accident occurred, in spite of and assuming the facts contained in the plaintiff's offer of proof (rejected on the ground that even if the evidence offered were adduced, it would not change the result) to the effect that it was a part of the Manager Burns' very general duties to expedite the departure of Company boats, and that Burns had authorized the use of the Company car for the purpose of getting the Engineer and the Captain down to the boat, so that they could assume their duties thereon.

For example, the plaintiffs were and are ready to prove in that connection,

(a) that earlier on the day of the accident, Burns had transported the Captain to The Company Office so that the Captain could make his report there, and

(b) that Burns, testifying before the Coroner's jury prior to the trial of Warner on a manslaughter charge, said, in reply to a question put by Mr. A. E. Jenkins, Counsel for Aetna Insurance Company, about the use of the Company car by Warner:

> "Being Company Employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it."

The plaintiffs appealed to the Supreme Court of Hawaii from this ruling, which court affirmed the trial judge. Judgment was rendered in accordance with this opinion, and it is from that judgment that the present appeal is prosecuted to this Court.

II. INTRODUCTION

(A) THE SUPREME COURT OF HAWAII TAKES JUDICIAL NOTICE OF THE NATURE OF THE COMMUNITIES ON THE DIFFERENT ISLANDS.

It was held in KING v. HELELIILII, 5 Hawaii 16, at 17,

that "the court will take judicial notice of the condition of the communities on the different islands." Conditions on the island of Maui, differ materially from those of the complex communities on the mainland of the United States. There is no trolley system on the island of Maui. There is a railroad system which never runs on Sunday, nor on any day between Paia and Kahului at the time at which the Captain and Engineer of the "Lubrico," found themselves at Paia when they should have been on their boat getting it ready to sail. The only means of transportation available between Paia and Kahului was by automobile, and certainly the General Manager, C. D. Burns, did not think, when he authorized them to use the Company car to go down to the harbor with all dispatch, that he was doing something that was not for the benefit of the Company, but was solely for the personal benefit of the Captain and the Engineer, as the trial judge ruled. Perhaps no one would have been more surprised than the Manager Burns if he were then told that he was not benefitting the Company in any way, but was simply sending the men off on a frolic of their own. If the President of the Standard Oil Company had been present in Paia, Burns would have felt warranted in authorizing the use of the Company car for the limited purpose of taking the Captain and Engineer to the boat. STUART v. DOYLE (Conn.) 112 Atlantic 653 at 656.

(B) THE LAW RELATING TO AUTOMOBILES AND ITS SIGNIFICANCE IN THE PRINCIPAL CASE.

Cases involving automobiles have become so numerous in the last ten years that they outnumber all other cases in our courts put together. The automobile has become so integral a part of the business and social life of America

that the law, which is concerned with, reflects, and seeks to keep abreast of practical situations as they arise, has been forced to take cognizance of that vehicle to the extent that it can now be said and must now be recognized that a somewhat new set of principles has been evolved to cover situations presented by the use of the automobile. The title, "Automobiles," in the Digest is the fastest growing title in the law. A new law of automobiles has been evolved by the course of judicial decision which has cut across the law of agency and modified its principles considerably. Within the last ten years the following exhaustive works relating exclusively to automobiles alone have been written:

SCHWARTZ on TRIAL OF AUTOMOBILE CASES
CLEVENGER'S COMPLETE NEW YORK LAW OF AUTOMOBILES
BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW
SANDERLIN ON AUTOMOBILE INSURANCE
NEW YORK LAW OF AUTOMOBILES, featuring "INJURIES TO PERSONS AND PROPERTY"
BERRY ON AUTOMOBILES
BABBIT ON MOTOR VEHICLES

The significance of this new law of Automobiles is that the emphasis has been shifted from the **agent** to the **agency**; that is to say, the inquiry now is, not simply was the man who drove the vehicle an employee of the owner of the vehicle acting within the course of the driver's employment, but rather, was the agency, the automobile, being used at the request of and for the benefit of the owner?

> "Liability for the negligence of a driver does not depend upon the strict relation of master and servant, but exists where the driver acts for the owner at his request, express or implied, for his benefit or under his direction."
>
> 2 BERRY on AUTOMOBILES 1074
>
> D'ALERIA v. SHIREY, 286 Fed. 523 (C. C. A 9th Cir.)

This is not the doctrine of "dangerous instrumentality." There, liability for the damage done by the automobile is absolute and exists independently of whether the driver was using the vehicle at the time for the benefit of and at the request of its owner or not.

ANDERSON v. COTTON OIL CO., 74 So. 975 at 978.

But the law of automobiles holds that the driver, in order to be the agent of the owner within the meaning of that law, need receive no compensation for his services:

D'ALERIA v. SHIREY, 286 Fed. 523;

NALLI v. PETERS, (N.Y. 1925) 149 N. E. 343;

ACKERSON v. JENNINGS, 107 CONN. 393, 140 ATL. 760

2 BERRY ON AUTOMOBILES, 1074;

RUBEL v. WEISS et al, 149 Atl. 756;

ALTHORF v. WOLF, 22 N. Y. 355.

Need not be driving an automobile belonging to his employer, but may be driving his own car at the time:

STUART v. DOYLE, 112 Atl. 653 (Conn. 1921)

Need not be in the employment of the owner at all:

2 BERRY on AUTOMOBILES 1074.

Need not be, if he is in the general employment of the owner, doing the thing which he had been hired to do:

D'ALERIA v. SHIREY, 286 Fed. 523;

STUART v. DOYLE, 112 Atl. 653.

In STUART v. DOYLE, 112 Atl. 653 (Supreme Court of Errors of Connecticut, Feb. 21, 1921) one O'Neil was employed by one Shepard as an office man and bookkeeper in his office at South Windsor, Conn. Shepard had men coming in from New York to work on his farm. It was the custom when men were to arrive to telephone the bookkeeper, O'Neil, who would see that they got to the farm for which they were bound. Shepard had two licensed chauffeurs and two cars which were used for that purpose. It was no part of

O'Neil's duties to drive a car at all.

The bookkeeper O'Neil's testimony with Shepard to the accident in question was as follows:

> "On August 21st in the afternoon an agency notified me at the office by telephone that two men were coming on the 4 o'clock train out of New York, arriving in Hartford about 7 o'clock. I tried to inform Shepard, but could not reach him, and as there were only two men coming I took **it upon myself to go to my home in Hartford for supper, then to meet the train and take the men up to South Windsor in my own car.** The collision occurred while I was taking the men up. It was my duty, in Shepard's absence, to give orders to one of the two licensed drivers to get the men. **My going for the men was my voluntary act; Shepard knew nothing of it; it was not what I was hired to do.**

The purport of Shepard's testimony, taken from the opinion, at page 655, follows:

> "When it was reported to the office that men were coming by train, the bookkeeper (the defendant O'Neil) usually got hold of Shepard, and he would send a chauffeur with an automobile to meet them. He had two men with driver's licenses and sent one or both if necessary. He did not know how it came about that his bookkeeper O'Neil went to the railroad station on August 21st to get a couple of men to bring out to the plantation. While he was away from the office, if telephones came in that there were men at the railroad station, O'Neil would try to get Shepard on the telephone. He did not know why O'Neil did not reach him that night. Shepard did not know that night that any men were coming. O'Neil's duties were the regular line of office work; to charge up sales, send out bills, attend to the correspondence, make up the pay roll, keep the bank balance, see to the shipping, and do whatever would come on an inside man.
> "Shepard had a light express truck and a heavy touring car and two licensed drivers to go for help in Hartford. O'Neil had a little roadster of his own, in which he drives back and forth from his home in

> Hartford five miles away. **He did not order O'Neil to go for these men in his car; it was out of the line of O'Neil's duties. O'Neil usually quit work at 5 o'clock. Shepard had no knowledge of his going for help on this occasion or on any previous occasion."** (112 A., p. 655)

The testimony of these two men, the bookkeeper O'Neil and the employer Shepard, was the only testimony in the record with regard to the authority, or rather, lack of authority, of O'Neil to do what he did in this case. The Connectitcut Court held that this did not mean that the question of the agency of O'Neil and the scope thereof became a question of law, but rather, that on the whole case, the trial court was right to submit the question of O'Neil's authority to the jury. In that connection the Connecticut Court at page 656 laid down the rules as follows:

> "Under the evidence presented, ambiguous in its nature, it was a fact for the jury to determine whether the act of O'Neil in transporting the help on the night in question was **warranted by the** express or **implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act was done.**
> "The mere fact that only two witnesses, Shepard and O'Neil, the master and the servant, testified as to O'Neil's employment and the scope of his duties, and characterized his act in transporting the help as a voluntary act, does not necessarily make the interpretation of their testimony a question of law, to be decided in accord with their characterization of O'Neil's act. The action of the trial court in submitting to the jury the question whether O'Neil was acting within the scope of his employment in transporting the help in his own automobile at the time in question was correct." (112 A. p. 656)

The Supreme Court of Errors also held that the burden was on the defense to show the availability of the two licensed chauffeurs of Shepard, if they were available at the time in question.

It should be noted:

1. That O'Neil was a bookkeeper and not a chauffeur.

2. That both O'Neil and his employer, furnishing the only testimony on the point, swore that it was no part of O'Neil's work to transport help and that what O'Neil did was after his hours of employment and solely on his own responsibility.

3. That O'Neil used his own car, and not his employer's

4. That the plaintiffs, in the case at bar, offered to prove that it was part of Burns' general duties to transport these men, to the end of expediting the departure of their boat from the Island of Maui.

A fortiori, in the case at bar, the jury could have found, under the circumstances of this case, that Burns was warranted in authorizing the use of the Company car, - that is, that he was impliedly authorized to do what he did unquestionably do, send men to the boat in the Company's automobile.

These principles are a far cry from the technical and strict law of agency as it had heretofore been understood. The limits of that law have been enlarged to meet the expanding needs of society. The only real question is: "Was the vehicle at the time the injury was done being used at the request of its owner and for that owner's benefit? When that question is answered in the affirmative, it is entirely immaterial that it had been previously used for another purpose, or under other circumstances, or that its driver happened to be doing something which he was not hired to do generally, or something which would **incidentally** be of benefit to himself as well as to the owner of the vehicle.

Under the law of automobiles the courts consider it intolerable that the owner of an automobile, (whether a corporation or a private individual can of course make no difference) should supply a vehicle for use in his business, and

when it is in fact used, by the authority of the agent or employee to whom it was entrusted, for a purpose for which he felt warranted in using it, as being for his employer's benefit, i. e., within the scope of his actual implied authority, —that thereafter the owner should seek to evade responsibility for the damage the vehicle has done while being so used, by the simple expedient of repudiating the act of his employees and agents and saying that what they were doing was on their own responsibility and for their own benefit entirely, and then having the driver-employee so testify as closely as he can.

THE PRINCIPLES OF THE COMMON LAW DO NOT PERMIT THE OWNER OF AN INSTRUMENTALITY THAT IS NOT DANGEROUS PER SE, BUT IS PECULIARLY DANGEROUS IN ITS OPERATION, TO AUTHORIZE ANOTHER TO USE SUCH INSTRUMENTALITY ON THE PUBLIC HIGHWAYS WITHOUT IMPOSING UPON OWNER LIABILITY FOR NEGLIGENT USE."

ANDERSON v. SOUTHERN COTTON OIL CO., 74 So. 975, (Fla.1917)

The test under the new law of automobiles is not only of the right to control the movements of the **driver** of the car. The test rather is in regard to the right to control the destination of the car itself, for the mere fact that the driver at the time receives no compensation for services or is not doing what he was hired to do by the terms of his general employment can make no difference in the owner's liability if the **vehicle** is used under the actual authority, either express or implied, of the owner and thus for the benefit of the owner.

(C) THE OFFER OF PROOF MADE BY THE PLAINTIFFS IS EVIDENCE IN THE CASE AT BAR.

The plaintiffs read into the record an offer of proof which was refused by the trial judge on the short ground that even if he received the evidence offered, it would not change his ruling against them. The offer consisted in substance of the following facts:

(a) That one C. D. Burns was the General Manager and the regular representative of the Standard Oil Company on the island of Maui, and that it was a part of his general duties to facilitate the passage of Company boats to or from the island of Maui, if the occasion should arise;

(b) That the said Burns authorized the engineer Warner to use the Company's car, a car which had been placed in the possession of C. D. Burns for use in Company business, for the purpose of transporting both Warner and the Captain to the harbor in order that they might earlier assume their duties on the Standard Oil Company tanker "Lubrico," which was anchored in that harbor;

(c) That there was an emergency or a sudden necessity which, aside from the general law of automobiles, justified the use of the Company's car to meet that sudden necessity, and that this way of meeting the emergency or sudden necessity was a reasonable one. And that, in any event, the use of the car was for the purpose of shortening the men's recess and thus lengthening the time of their employment.

Counsel for the defense strenuously contended before the Supreme Court of Hawaii that none of the facts in the offer of proof could be considered as evidence in the case, claim-

ing that the trial judge had exercised a discretion in refusing the offer —an alleged discretion which could not be disturbed by the Supreme Court. And this in spite of the fact that they had secured the rejection of the offer by assuming in the trial court the facts contained in the offer of proof. Of course, the position of the defendants was rejected on this point by the Supreme Court of Hawaii, which in its opinion, said:

> "Since the trial court did not base its refusal to allow the plaintiffs to reopen the case and to make the proof which they offered to make on the ground that the offer was not sufficient or that under the circumstances it came too late, **but solely on the ground that the proof, if made, would not alter the legal status of the parties**, we will pass the question of whether it was an abuse of discretion to deny the motion without comment and **treat the case as though the proof had been made.**"
>
> (Transcript of Record, page. 25.)
>
> (Emphasis ours.)

FOR, OF COURSE, IT CANNOT BE SAID IN ONE BREATH THAT THE OFFER OF PROOF WAS PROPERLY REFUSED BECAUSE IT COULD NOT CHANGE THE RESULT, AND IN THE NEXT BREATH THAT THE RESULT CANNOT BE CHANGED BECAUSE THE OFFER OF PROOF WAS PROPERLY REFUSED.

We do not anticipate that the defendant corporation will here renew a position which it could not sustain even before the Supreme Court of Hawaii. However, the most recent cases follow:

GIBSON v. GILLESPIE, 152 A. 587 (1928 Del.);
DAVIS v. CO., 296 Pa. 449, 146 A. 119;
LEDBETTER v. MARTINEZ, 12 S. E. (2) 1042;
ANDERSON v. BRYSON, 94 Fla. 1165, 115 So. 505;
SIEGAL v. CAB CO., 23 Ohio App. 438, 155 N. E. 145.
MORE v. CENTRAL GA. RY., 1 Ga. App. 514, 58 S. E. 63;
RICE v. WARE & HOOPER, 3 Ga. App. 573, 60 S. E. 301;

PARKER v. DENNISON, 249 Mo. 449, 155 S. W. 797;
BUCK v. McKEESPORT, 223 Pa. 211, 72 A. 514;
TAKULA v. STARKEY, 161 Minn. 58, 200 N. W. 811;
STURMER v. NEWBERGER CO., 94 Miss. 572, 48 So. 187;

III. ARGUMENT

(A) HOW EVIDENCE MUST BE VIEWED ON A MOTION FOR NONSUIT.

It is perfectly well settled in the authorities, beyond any doubt whatever, that on a motion for nonsuit, all the evidence adduced or offered by the plaintiff is considered as true, and that every reasonable inference from that evidence must be drawn favorable to the plaintiff's case, so that the question is IF ON ALL THE EVIDENCE ADDUCED AND OFFERED AND INFERENCES THEREFROM, a verdict for the plaintiffs were returned by the jury, would it be the duty of the appellate court to set that verdict aside as being not supported by the evidence, more than a mere scintilla? The Supreme Court of Hawaii paid lip - service to this doctrine in several well-considered cases.

IN THE MATTER OF THE ESTATE OF JULIA H. AFONG, DECD., 26 Hawaii 147, at pages 151-152:

"It is settled law in this jurisdiction that in deciding this question the evidence must be considered in the light most favorable to the contestants; that the proponent must be considered as admitting not only the facts which the contestants' evidence tends to establish but also every inference which a jury might fairly draw from such evidence."

In CHUN QUON v. DOONG, 29 Hawaii 539, at page 544, the court said:

"The motion for a nonsuit presents merely the ques-

tion of law whether the plaintiff has adduced some substantial evidence, more than a mere scintilla, sufficient, if believed, to support a finding and judgment in his favor."

(B) THE SUPREME COURT OF HAWAII'S MANNER OF VIEWING THE EVIDENCE.

Presumably under the compulsion of this rule of law, the Supreme Court of Hawaii went on to consider the evidence which was claimed by the plaintiffs to present a case for the jury as to the presence of a sudden necessity for getting the Engineer and the Captain down to the harbor, and the meeting of that necessity by the reasonable means of the Company's car, which was in the possession of the Manager of the Company on the Island for the very purpose, among others, for which it was used in this case. At any rate, a question for the jury as to the implied actual authority of Burns to so use the car, was presented. **If there was any evidence to the contrary, the defendant should have offered it for the consideration of the Court and jury.**

Mr. Warner was, it is true, placed upon on the stand by the plaintiffs. Under the circumstances, however, it is perfectly apparent that this was done very gingerly. Mr. Warner, it is perfectly clear, had the interest in the litigation of preserving his job. He was a hostile, evasive and unwilling witness. The plaintiffs were surely not bound by everything he said. See STUART v. DOYLE, supra. The only check which the plaintiffs could have had on his story and on him was a transcript of his testimony given in his manslaughter trial on Maui, and **of which the plaintiffs were not yet in possession at** the time of his examination. In reply to a question from the court (Tr. p. 75) as to when he was "due back on the boat," he replied, "I asked the chief officer when he would be ready to go and he said between 9 and 11, **so I thought to get back about 7:30.**"

Viewing this evidence most favorably to the plaintiffs, the Supreme Court said that this had no tendency whatever to show that it was really his duty to be back at the boat at that time, that is, at 7:30! The court's remarks in that connection follow:

> "It has no tendency whatever to show that the necessities of the defendant's business, in any of its aspects, required Warner to return by 7:30 o'clock or at any definite hour before the boat sailed. It only shows that he knew the hours within which the boat would sail and that he intended to return to it by a certain time.
> **Whether he intended to do this because of some duty which he as Chief Engineer was required to perform in connection with the departure of the boat, or whether he merely perferred, for his own pleasure or convenience, to spend the time intervening between 7:30 and the hour of sailing on the boat or in its vicinity does not appear."**
> (Emphasis ours.) (Transcript of Record, page 26.)

From the italicized portion of the court's remarks,it is apparent that there was at least an ambiguity in the reply of Warner as to whether it was his **duty** to be back on the boat about 7:30, or whether he merely intended to go back because he was fond of the vessel and desired to be around it as much as possible. Yet the Supreme Court, recognizing this ambiguity, resolved it in favor of the defendant corporation, an sdimply observed that "the jury was properly not permitted to speculate about this." (Tr. p. 26)

Viewing the evidence most favorably to the plaintiffs, Warner was **due back** on the boat at 7:30 or earlier, for the reason that he had duties to perform thereon pursuant to his employment as Chief Engineer of the boat. That is the natural, plain, obvious import of the question and answer. He was asked when he was "due back," i.e., when it was his **duty** to be back on the boat. The only responsive part of his reply was

"about 7:30." The portion of his answer dealing with the time of the sailing of the boat is obviously explanatory of why it was his duty to be on the boat at about 7:30—for he used the word "so" as meaning "therefore". It was his duty to return by at least 7:30, and superintend, as Chief Engineer, the preparation of the boat for sailing. The accident occurred at eight o'clock, when he should have been on the boat performing those duties, at a point at least five miles from the harbor, while he was traveling at a terrific rate of speed in a Company car whose use was authorized by the General Manager of the Company on the Island. The ambiguity in Warner's reply, taken together with the facts and inferences surrounding the authorization to use the car, together with the facts contained in the offer of proof with regard to the duty of Warner and the Captain to be on the boat an appreciable interval before the time set for sailing, and the duty of Burns to expedite their departure, certainly presented at the very least a question for the jury.

Warner was certainly not vouched for by the plaintiffs. He had every reason to color his testimony. He made it clear that the retention of his job depended on the outcome of the litigation. Under the modern rule wherein the employee and driver in an automobile case are called to the stand under circumstances such as those involved in this case, plaintiffs certainly do not "vouch" for them or their testimony, and it is for the jury to evaluate that testimony. In these cases, the employee is always anxious to keep his job and the employer is always anxious to avoid responsibility.

D'ALERIA v. SHIREY, 286 Fed. 523.

STUART v. DOYLE, supra

Certainly, in all fairness, a plaintiff who is forced to call the defendant's employee as a witness, is not bound to accept every inference that can be drawn from the testimony favorable to the defendant's case. In view of the source

thereof, any evidence adduced thereby which is favorable to the plaintiff's case is surely entitled to great weight.

(C) THE MODERN LAW AS LAID DOWN BY THIS COURT BY THE HOLDING IN D'ALERIA v. SHIREY, 286 Fed. 523 (C. C. A. 9th Cir.)

2 BERRY on AUTOMOBILES, 1074.

D'ALERIA v. SHIREY et ux, 286 Fed. 523 (Circuit Court of Appeals, Ninth Circuit, February 5, 1923. Rehearing Denied March 12, 1923.)

D'Aleria was employed by the plaintiff in error as a musician. On the night of the accident, at about eleven P. M., the plaintiff in error, who was driving the car, and the musician arrived at their hotel. The plaintiff in error went into the hotel, leaving D' Aleria to take the automobile to the garage where it was usually kept. Twenty minutes later the collision occured while the automobile was being driven by D'Aleria. **The only testimony as to what occurred from the time when he left the hotel until the accident, was furnished by D'Aleria.** He testified that the plaintiff in error told him to take the automobile to the garage, and that he replied that he would first call at a certain music store to see a music publisher. He testified that he did make the call and that thereafter he picked up a friend, whom he intended to take to the Fairmont Hotel, and that he was about to do so when the accident occurred.

Rudkin, Jr., below, instructed the jury that on this evidence they could find for plaintiff and against the plaintiff in error. The jury did so. An appeal was taken to this Court which affrimed the rulings of Rudkin, J. below.

In the Shirey case it is significant that the only testimony as to what occurred was furnished by the driver of the vehicle, who was in the employ of the defendant, and whom he later married. This Court, of course, held

that the plaintiffs were not bound by the testimony of so interested a witness. In this case Warner, the Chief Engineer, was in the employ of the defendant, and assisted the defendant corporation at every stage of the trial.

In the Shirey case the capacity in which the driver was employed by defendant had nothing to do with operating a motor vehicle. He was employed as a musician. In the instant case, therefore, the fact that the general employment of Warner was as a Chief engineer does not alter the fact that his use of the vehicle in this instance, together with the Captain, was for the owner's benefit. The Captain and Engineer were not pursuing their personal ends entirely.

D'Aleria testified in positive terms that at the time of the collision he was pursuing his own personal ends entirely. That was the only testimony on the subject, and yet the plaintiffs were allowed to recover on the theory that the main purpose of his use of the car was to take it to the garage, which was for the owner's benefit. **In the case at bar, it was uncontradicted that the main purpose of the use of the car was to transport the Engineer and the Captain to the boat.** Appellants further contend that it was under circumstances where time was an important element. It is true that Warner later offered the suggestion that, depending on the whim of the Captain, they might have decided to have a sandwich at Kahului before boarding the boat. This at most created a conflict in his testimony with regard to the use of the car, and was at variance with the rest of his testimony. The resultant conflict was never submitted to the jury. However, under the rule of D'Aleria v. Shirey, even if the men did intend "to have a sandwich," the main purpose of the trip would still be the transportation of the two officers to the boat.

Under the modern law, "liability for the negligence of

the driver does not depend upon the strict relation of master and servant, but exists where the driver acts for the owner at his request,, express or implied, for his benefit or under his direction." 2 BERRY on AUTOMOBILES 1074, D' ALERIA v. SHIREY, 286 Fed. (C. C. A. 9); ANDUHA v. COUNTY OF MAUI, 30 Hawaii 44; STUART v. DOYLE, Supra. In the case at bar the "enterprise" in which Warner and the Captain, through Burns, were engaged **and the absolutely sole interprise in which they were engaged, was that of transporting the Engineer and his Captain down to the harbor in time to perform their duties on the boat.** The car in question was taken from the garage of the Manager Burns' house in Paia. Where the men were before the situation became acute at Burns' house in Paia, is entirely immaterial. There is no question here of any "enterprise" or undertaking on the part of Burns to convey these men to or from any golf-links; the evidence finds the car which figures in this case in Paia at the home of Mr. Burns. What the men happened to be doing before they got there is entirely immaterial. Certainly, no less immaterial than was the fact that Kanahele was returning from the island of Molokai (where, from all that appears, he might have been on a vacation) in ANDUHA v. COUNTY OF MAUI, 30 Hawaii 44. In that case one Leong was employed by the County of Maui in the engineering Department. A. P. Low was then County Engineer. Leong was sent by Low to Lahaina in a Hupmobile belonging to the County for the purpose of bringing back to Wailuku one Kanahele, **who was returning from the island of Molokai,** and who was in the employ of the County as a surveyor. A collision occurred between the County's Hupmobile and the plaintiff's car on the public highway between Wailuku and Lahaina at about six o'clock in the evening, **after the driver's hours of employment.** It was contended by the defendant, the County, that Leong in driving the car was not acting within the

scope of his employment. The verdict for the plaintiff against the County of Maui was held supported by the evidence.

(D) THE LAW OF AUTOMOBILES AS ESTABLISHED BY THE MOST RECENT JUDICIAL PRONOUNCEMENTS.

It has been held, again and again, that "enterprises" far less clear in their benefit to the owner than that of getting these two men to the boat in a Company automobile was company business or for the owner's benefit.

For example, whether a banquet given after working hours for employees by a manager was within the manager's actual implied authority, was held a question for the jury in an action for injuries to an employee who was returning from the banquet in the defendant's automobile supplied by the manager, **despite the fact that the manager testified positively that the banquet was a purely personal matter; a mere gift from him to the employees under him.** ACKERSON v. JENNINGS, 107 Conn. 393; 140 Atl. 760.

Where one was employed as a salesman in a store, and also on the road, and who, after attending a baseball game, was driving his employer's automobile to the home of one with whom he had left a phonograph on trial, and an accident occurred at that time, the evidence was held to make a question for the jury as to whether he was acting within the scope of his employment at the time of the collision, and was held to support the jury's finding for the plaintiff. GOOD v. BERRIE, 123 Me. 266; 122 Atl. 630.

In CITY of ARDMORE v. HILL, 136 Okla. 200, 293 Pac. 554, the defendant was supplied with an automobile for use in the performance of his duties, which automobile he kept at his house. **On the occasion in question, he testified that he was going for groceries for his family and was not doing**

any business at all for the company. The court held that the fact that the automobile was supplied to him and kept at his house for the purpose of being used for company business, if any should arise, was sufficient to create a question for the jury as to whether the company is, under those circumstances, liable for the use of the car, and the court sustained a verdict for the plaintiff.

Where the manager of a corporation ordered an employee of a separate business to take a car to a garage, whether the employee was engaged on an errand within the scope of his employment was for the jury. DI MARCO v. THE COMPANY, 220 Ill. App. 254.

In MULLINS v. RICHIE GROCERY CO. (ARK) 1931, 35 S.W. (2d) 1010, it was held that a salesman was acting in the course of his employment, on conflicting evidence, while driving his principal's car at eleven o'clock at night.

In DILLON v. THE INSURANCE COMPANY (Calif.) 242 Pac. 736, it was held that an automobile was a reasonable means for the conveyance of an insurance agent as affecting the insurance company's liability for injuries inflicted by that automobile by the agent, and therefore it was held that the insurance agent's use of the automobile was impliedly authorized by the Company.

In KRAUSEL v. THIEME, 13 La. App. 680. 128 So. 670, an automobile salesman, while traveling home in his employer's car at night, was held acting within the scope of his employment.

In CARDOZA v. ISHERWOOD (Mass.) 154 N. E. 859, it was held that whether a dealer's employee, authorized to sell automobiles after working hours, was acting within the scope of his employment, was a question for the jury. See also CASTEEL v. YANTIS-HARPER TIRE CO., 36 S. W. (2d) 406; RYAN v. FARRELL, 280 Pac. 945; BROWN v. MONTGOMERY WARD & CO., 286 Pac. 474; JACOBSON v. BEFFA (Mo. App.) 282 S. W. 161.

SILENT AUTOMATIC SALES CORP. v. STAYTON, 45 Fed. (2d) 474; Circuit Court of Appeals for the Eight Circuit, decided November 28, 1930, rehearing denied January 10, 1931. The court said at page 474:

> "The great weight of reason and authority is to the effect that where an employee is returning from work, with the consent and by the authority of the employer, in a vehicle owned or used in the business of the employer, he is acting within the scope of his employment. Where the master places at the disposal of the servant an automobile to be used by the servant in getting to and from his work, the transportation is beneficial to both, and the relation of master and servant continues while the automobile is used for such purpose."

The fact that it is only for a single occasion does not alter the essential nature of the use of the car.

WARNE v. MOORE, 86 N. J. Eq. 710, 94 Atl. 307.

In GORMAN v. JAFFA, 248 Mich. 447, 227 N. W. 775, it was held that an employee, who, with authority, took his employer's car to go to lunch, was acting within the scope of his employment as a matter of law.

In ZONDLER v. FOSTER, 277 Pa. 98, 120 A. 705, where a general sales agent requested a truck driver to test the battery of the agent's car, and authorized the truck driver to take the agent's car home with him to dinner, and an accident occurred during the trip, it was held that it was a question for the jury whether the use of the agent's car by the truck driver was with the implied authority of the agent's master and in pursuance of his business. The court supported the jury's finding that it was.

(E) WHERE THE OWNER'S AUTOMOBILE IS USED BY AN EMPLOYEE TO SHORTEN A RECESS AND THUS LENGTHEN THE TIME OF EMPLOYMENT, THE OWNER IS UNIVERSALLY HELD LIABLE.

It has been held again and again that where a vehicle is

used to shorten the length of some holiday or recess or lunch period and thus to lengthen the time of the employment, that there the use of the vehicle is certainly for the benefit of the employer and the employer is liable for damage done at that time. Under any view of the facts, under this rule, it is not a question of "emergency" or "necessity" or anything like that at all. The rule simply is that if an employee is on a holiday, or a recess, or a lunch hour, and an automobile owned by the company is used, with the authority of the agent to whom it was entrusted, by the employee to shorten the extent of the time off and thus lengthen the time of the employment, the use of the car is for the benefit of the company at least in part, and the company is liable.

Under any view of the facts, such a case is presented here, and there is a case for the jury.

BRENNAN v. THE WHITE MOTOR C., 206 N. Y. S. 544, 210 App. Div. 533, affirmed by the New York Court of Appeals in 148 N. E. 720.

One Hames was employed by the company as head of the used-car department. His home was about a mile from his work. One evening, between 5:30 and 6:00 o'clock, he went to his home in one of the defendant's cars to get his supper. His wife was not home. He then started to the home of his wife's mother, at which time he negligently injured the plaintiff. The court said in 206 N. Y. S. at page 546, that

> ". . . . his purpose in using the car to get to his supper was to shorten the time taken in going and returning, and so lengthen the time for service. Mrs. Hames prepared the meals for her husband; getting her was an incident of getting his supper. The fact that the accident happened while going from his home after his wife cannot affect the result. The jury had a right to find that Hames, in using this car to go to his supper, was rendering a service to his employer."

See also, to the same effect:

DEPUE vs. SALMON CO. 92 N. J. Eq. 550, 106 Atl. 379;
DAVIES v. CO., 261 S. W. 401;
SNYDER v. ERICKSON, 193 Pac. 1080, Kansas 314.
GORMAN v. JAFFA, 248 Mich. 447, 227 N. W. 775
ZONDLER v. FOSTER, 277 Pa, 98, 120 A. 705
54 Cal. App. 654,

IV. CONCLUSION

The Standard Oil Company of California maintains a resident manager on the island of Maui of the Hawaiian group, out in the middle of the Pacific Ocean, whose duties are naturally very broad. (Tr. pp. 71, 72 73 and 76.) The Company furnished him with an automobile. C. D. Burns, the Manager in question. undertook the transportation of the Chief Engineer and the Captain of the oil tanker "Lubrico," anchored in the harbor at Kahului, Maui, to that harbor, and authorized their use of the Company automobile to carry out that enterprise, and for no other purpose whatsoever.

CANNON v. DUPREE, 294 S. W. 298 (1927)

> "The mutual purpose and intention was to have Mr. Taylor specially 'drive the car' to the lake as a means of transporting the parties therein. Appellant did not lend the automobile to Mr. Taylor to use at his will, and he was not to act merely as the custodian of the same, but he was to drive it in completion of the journey undertaken, and there his use was to cease. His right was simply one of driving the automobile to the end of the journey, independent of any control or claim over it. Therefore he was not merely a bailee."

The Engineer had testified that he was "due back" on the boat at "about seven-thirty." It was eight o'clock when the automobile struck and killed the father of the plaintiffs

while he and his Captain were still at a point about five miles from the harbor at Kahului.

In that connection it is worth nothing that the plaintiffs were ready to show by the offer of proof that it was the Manager Burns' general practice to furnish Company transportation for these men while they were on the Island as is natural, and that for example he had done so for the Captain of the "Lubrico" earlier on the day of the accident in order to transport the Captain to Kahului to make his report to the Standard Oil Company office there, and also that Mr. Burns, in testifying before the coroner's jury, prior to Warner's manslaughter trial, in response to a question put by the attorney for the Aetna Insurance Company concerning the use of the Company car, used the following interesting words:

> **"Being Company employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it."**

The only control with which we are here concerned is the control over the movements of the car, a legal control which was never abandoned by C. D. Burns, The use to which the Captain and the Engineer were to put the car was the very limited one of transporting themselves to the harbor. Under any view of the case, the Company car was used by the authority of the Company Manager for the Company's benefit, to shorten the length of a shore leave and thus to lengthen the time of employment.

The means of transportation on the island of Maui is chiefly by automobile. This fact being well known to the Company, it furnished one of its cars to Mr. C. D. Burns, its resident manager on that island.

And yet when Mr. Burns authorized the use of the car for what he, in the reasonable interpretation of his powers considered to be for the Company's benefit, counsel for the

corporation, after the car has been so used and the damage has been done, raise the defense of no authority!

We respectfully but earnestly submit that, certainly, under the circumstances of this case, such a defense has no merit.

It is the contention of appellants that the car was entrusted by the Company to Burns so that it could be used, among others, for just such a purpose as that for which it was used in this case that is to say, the car was used for one of the purposes and to meet one of the situations which Burns was certainly impliedly authorized to meet in carrying out his duties as Manager of the Company on the island, whose duty it was to expedite the passage of the Company's boats if the occasion for it should arise, as it did in this case. The jury, and the jury alone, had the right to decide whether Burns was impliedly authorized to do what he did, i.e., whether Burns was warranted in his action (STUART v. DOYLE, supra) and whether the time element was of importance in the matter.

The Supreme Court of Hawaii seems to have required the plaintiffs to sustain a case for the jury by direct evidence Alone. But often as in this kind of case direct evidence is not available. Inferences, however, point to a concusion just as powerfully as does direct evidence. Under these circumstances the determination of the fact and scope of an agency properly remain for the jury, even where both the principal and the agent categorically deny the existence of the relation or the presence of authority.

21 R. C. L. 830, Section 6;

2 CORPUS JURIS 577, Sec. 218;

MECHEM on AGENCY 527.

STUART v. DOYLE, supra.

Here is an island in the middle of the Pacific Ocean. Here is C. D. Burns, Manager of the Standard Oil Company

on that Island. Here are the Chief Engineer and the Captain of the "Lubrico," a Company boat anchored at the harbor at Kahului. Here is the Engineer "due back" on that boat at a time when he and his Captain are still about ten miles from the harbor. Here is a Company automobile in the control of the Manager, who authorizes the two men to use the car to transport them to the Company boat. Here is an offer to show more specifically that it is Burns' duty, among other things, to expedite the Company's affairs on the Island, including the passage of the Company boats. **Here is the plaintiff's decedent killed while these men, Company employees, in a Company car, whose use was authorized by the Company manager, for what he was warranted in thinking a Company purpose, were speeding to the harbor where their boat was anchored, at a point about five miles from the harbor, and at a time half an hour after that at which the Engineer has testified that he was "due back" on the boat.**

We appeal to this Honorable Court to send the case back for a new trial.

Respectfully submitted,

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No. 6876

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TIMOTEO ANGCO and CIPRIANO ANGCO (minors), by VICTOR FERIL ANGCO, their uncle and next friend,

Appellants,

vs.

THE STANDARD OIL COMPANY OF CALIFORNIA (a corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

FOREWORD.

It is with great regret that we find that we cannot agree with appellants' "Statement of the Facts" and with a great many statements, as of fact, made in the body of their brief. It would have greatly reduced our labors—and have assisted the Court—if counsel had confined their statements to matters supported by the record. Fortunately, the transcript of the proceedings in the trial Court is short and the Court can check very quickly the glaring discrepancies between appellants' statements and the record facts, which are set forth on pages 68 to 75, inclusive, of the transcript.

At the conclusion of the testimony, defendant moved for a directed verdict. (Trans. pp. 75-6.) Before the motion was acted upon, plaintiffs moved to reopen the case. The proceedings upon the latter motion will be found on pages 76 to 81, inclusive, of the transcript. This motion was denied and a verdict was directed in favor of defendant. (Trans. p. 81.)

Appellants' brief does not contain a specification of the errors relied upon, as required by Rule 24 of this Court.

The argument on various matters is so intermingled that it is difficult to determine upon which of the assignments of error contained in the transcript appellants do rely, and no reference is made to any of them.

II.

STATEMENT OF THE CASE.

On June 16, 1930, defendant's steamship "Lubrico" was anchored at Kahului, Island of Maui. Mr. Daniels was captain of the vessel and Mr. Warner was her chief engineer. Between 2:30 and 3:00 o'clock in the afternoon, Mr. Warner left the vessel, on a pleasure trip, to play golf with a Mr. Burns, an agent of the defendant, who resided at Paia—a distance of about eight miles from Kahului. Before leaving the vessel, Mr. Warner asked the chief officer when he would be ready to sail and the latter said "between 9 and 11".

In the evening (the exact time does not appear in the record, but in a statement to the trial Court *plain-*

tiffs' counsel said it was *6:30*) (Trans. p. 78), Mr. Warner took an automobile belonging to defendant, and used by Mr. Burns, from Mr. Burns' garage at Paia and, with Captain Daniels accompanying him, proceeded to drive toward Kahului. While enroute, the car was driven by Warner against a parked truck which was faced toward Kahului and Felix Angco and another Philipino were killed. "The accident occurred *between the hours of seven and eight o'clock P. M.*" (Trans. p. 70.)

The plaintiffs called Mr. Warner as their witness and the only evidence in the record with respect to the purpose of his time ashore and his return trip to Kahului is contained in his testimony, which is uncontradicted. He testified he and Captain Daniels were going to the steamship "Lubrico" but expected first to stop and eat in Kahului (Trans. p. 73); that his duties on the boat were the usual duties of a chief engineer of a steamship, and that the boat would go to sea under the command of Captain Daniels "from the outside of Kahului harbor". (Trans. p. 73.)

He further testified that "he had no duties on shore at Kahului on the night or afternoon of June 16, 1930; that at the time he was driving the automobile he had not come from performing any duties for the Standard Oil Company and at the time he was driving the car he was not performing any duties for said company; that he was driving down to have a sandwich before going on the boat". (Trans. p. 74.)

The trial Court questioned Mr. Warner very minutely as to his actions and purposes and we believe

that, as the answers given the trial Court go to the vitals of this case, it will be of assistance to this Court to quote the questions and answers, verbatim, as they appear on pages 74 and 75 of the transcript. We now do so:

"The Court. The court would like to ask a question in view of the line of examination taken, in anticipation of being called upon to make rulings in the matter. When you went ashore did you go ashore in connection with being under orders from anybody having a right to give you orders, or were you on shore that night?

A. Whenever I go on shore I can go as I please.

The Court. Did anyone order you to go ashore in connection with the boat?

A. No.

The Court. In connection with driving the automobile that night did anyone give you any orders in connection with driving the car?

A. No.

The Court. Did anyone give you any orders as to where you should go?

A. No.

The Court. At the time of the accident were you under orders of any superior, orders of anyone on the boat?

A. No, I just asked him if he wanted to eat.

The Court. At the time you got in the car to go back to the boat the captain was with you?

A. Yes.

The Court. Did the captain give you any orders as to returning to the boat and resuming your duties at that particular time?

A. No, sir.

The Court. Were you performing any task or errand on behalf of the captain?

A. No, sir.

The Court. When did you leave the 'Lubrico' to come ashore?

A. Between 2:30 and 3 o'clock.

The Court. At that time were you on any errand connected with the boat?

A. No, sir.

The Court. Were you in company with the captain under his orders to accompany him?

A. No, sir, I went there mostly with Mr. Burns to play golf.

The Court. A pleasure trip?

A. Yes.

The Court. When were you due back on the boat?

A. I asked the chief officer when he would be ready to go and he said between 9 and 11, so I thought to get back about 7:30."

In response to questions of plaintiffs' counsel, Mr. Warner testified that it was his "duty to be back on the boat in time to sail". (Trans. p. 75.)

While we shall discuss hereafter some of the misstatements contained in appellants' brief, we desire to call the Court's attention to some of them at this point. They open their brief (page 1), with the statement that the accident occurred "at *eight* o'clock" and that "Mr. Warner was *due* back on his boat at about seven-thirty". This appears—in the light of the record—to be a deliberate attempt to mislead the Court into the belief that Mr. Warner was already overdue upon the ship and that an emergency had

arisen demanding the use of defendant's automobile. There is not a scintilla of evidence in the record to support such contention.

The *only* evidence is that the accident occurred "between the hours of seven and eight o'clock P. M." (Trans. p. 70) while Mr. Warner testified that he "*thought* to get back *about* 7:30". (Trans. p. 70.) As shown above, Mr. Ulrich, plaintiffs' counsel, elicited the testimony that it was his "*duty to be on the boat in time to sail*". (Trans. p. 75.) The sailing time was "between 9 and 11". (Trans. p. 75.) With only eight miles to travel (Mr. Ulrich said it was approximately five miles; Trans. p. 78), it was obviously a trip of only 10 to 20 minutes by automobile. The two men could easily have walked from Paia to Kahului and have arrived considerably before 9 o'clock—the *earliest* hour of sailing.

Here is a statement quoted from page 3 of appellants' brief, *not one* allegation of which is supported by the record, excepting the statement that the trial judge ruled that the chief engineer and the captain were using the car solely for their personal benefit:

> "Conditions on the island of Maui, differ materially from those of the complex communities on the mainland of the United States. There is no trolley system on the island of Maui. There is a railroad system which never runs on Sunday, nor on any day between Paia and Kahului at the time at which the Captain and Engineer of the 'Lubrico', found themselves at Paia when they should have been on their boat getting it ready to sail. The only means of transportation available between Paia and Kahului was by automobile,

> and certainly the General Manager, C. D. Burns, did not think, when he authorized them to use the Company car to go down to the harbor with all dispatch, that he was doing something that was not for the benefit of the Company, but was solely for the personal benefit of the Captain and the Engineer, as the trial judge ruled."

Similar misstatements are sprinkled through the brief, counsel displaying an utter disregard for the evidence disclosed by the record.

There is no statement whatever in the appellants' "Statement of Evidence" that defendant ever authorized Mr. Burns to allow the "Lubrico's" officers to use the automobile or that Mr. Burns authorized the use of it. In fact, plaintiffs' witness Cummings testified that "they (presumably the boat's officers) told me they *took* the car from Mr. Burns' garage." (Trans. p. 70.)

Yet, throughout their brief, counsel boldly state that Burns authorized the officers to use the car. It would not alter the result in this case if the record did show authority to and from Burns, for the plaintiffs' uncontradicted evidence is that Mr. Warner went ashore for the purpose of playing golf and that he had no duty whatsoever to perform for defendant while ashore. Incidentally, since Warner was the vessel's chief engineer, it would appear quite obvious that his employment would be confined to the vessel. Marine engines are not operated or repaired upon golf courses.

III.

POINTS TO BE PRESENTED IN THIS BRIEF.

There being no assignment of errors in appellants' brief and the contentions of counsel not being arranged in logical order or with reference to any assignment of error set forth in the transcript, it is difficult to put our reply in orderly sequence. However, we shall discuss the case under the following points:

1. The denial of plaintiffs' motion to reopen the case after the testimony had been closed and defendant had moved for a directed verdict was a proper exercise of discretion by the trial Court.

2. The evidence which plaintiffs proposed to offer if the motion to reopen had been granted does not affect the propriety of the trial Court's action in directing a verdict; it can be considered only in connection with the denial of the motion to reopen.

3. It is the duty of a trial Court to direct a verdict for defendant where there is no substantial evidence to support the allegations of plaintiff's complaint.

4. The evidence in this case showing, without contradiction, that Warner was using the car for his own purposes and not at all in the course of his employment by defendant, there was a total failure of proof. Assuming the inference from defendant's ownership and from its employee's driving the car that it was being used on defendant's business, such inference was wholly destroyed by plaintiffs' introduction of Warner's testimony.

5. Plaintiffs did not stand upon the inference, but produced Warner as their witness, did not attempt to impeach him, and are bound by his testimony.

6. Appellants' violation of Rule 24 of this Court's rules and insufficient assignments of error.

IV.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION TO REOPEN.

Plaintiffs' complaint alleged that "Warner was an employee or agent of said defendant" and that "Warner, while driving a certain automobile *on business for defendant, and while acting within the scope of his employment*" negligently drove said automobile. (Trans. p. 3.)

Counsel upon making his motion to reopen was asked by the Court what evidence he desired to introduce. He said he wanted to prove "*by Mr. Burns* that he did authorize Mr. Warner to take the car for the purpose of driving himself and the captain down to *resume* their duties on the boat". (Trans. p. 76.) (The Court will note that counsel impliedly admitted Warner would not be on any duty until he reached the boat.)

Counsel also stated that he wanted to prove that Mr. Burns was an agent with general authority, and "to show facts which will present a question to the jury as to whether there was an emergency". In response to the Court's question as to what facts he intended to present, the following colloquy occurred:

"Mr. Ulrich. The fact that it was 6:30 in the evening; the fact that the boat was leaving that night, as they understood at the time, between 9 and 10 or 11 o'clock; the fact there were duties for the captain and engineer to perform on the boat before the boat left; the fact that they were at a distance, several miles——

The Court. More than five miles?

Mr. Ulrich. I don't know.

Mr. Pittman. I think about five miles.

The Court. The witnesses placed the scene of the accident between two and three miles from Paia.

Mr. Ulrich. They were at the Burns' home when they took the car. I think we can say at least five miles, or approximately that, from the boat.

The Court. Were telephones accessible?

Mr. Ulrich. I don't know what the evidence would show.

The Court. What do you think the evidence would show?

Mr. Ulrich. I don't propose to show that there might have been other ways of getting them down. In other words, I am not suggesting I will be able to prove this is the only way they could have gotten to the boat, but I do suggest it is a reasonable way." (Trans. p. 78.)

Defendant's counsel stated in open Court:

"We had Mr. Burns down from Maui" (the trial was in Honolulu) "at the request of plaintiffs' counsel ready to answer any questions they wanted to ask him, and he went home yesterday afternoon, because he has to get his accounts out for this month." (Trans. p. 77.)

This statement was not denied by plaintiff's counsel.

Because it is difficult to put it in narrative form, we shall quote substantially all of the further proceedings upon the motion (Trans. pp. 79-81):

"The Court. The Court will permit you to do this, to go and interview Mr. Burns, accompanied by counsel for the defendant.

Mr. Wild. He went home last night.

The Court. I understand from the facts disclosed that the man concerned, Mr. Burns, has been in attendance on the Court and has gone back to his employment on Maui.

Mr. Ulrich. We have a record of the testimony, so far as the lending of the car is concerned, taken at the other trials, and so far as his duties are concerned, we can call another officer of the Standard Oil Company.

The Court. With Burns missing and absent without any fault on the part of the defendant, what witness are you intending to offer?

Mr. Ulrich. I should call the Captain. I have the testimony.

The Court. Let's see the testimony.

Mr. Ulrich. As to the scope of the employment I would have to call some officer of the Standard Oil Company here.

The Court. Who?

Mr. Ulrich. Whoever is the representative of the Standard Oil Company.

The Court. The Court will permit you to go with counsel for the defendant and find that officer and check up on the matter. Anybody here whom Mr. Ulrich wants to interview?

Mr. Pittman. I will go down and bring you up an officer.

Mr. Wild. We have no objection to his interviewing any official of the company he wishes. Mr. Campbell I think would be the one.

Mr. Ulrich. I don't offer to prove that he has any control over the boats. My offer was to prove that he might take such steps and do such things as might be necessary to expedite the movement of the company's boats.

Mr. Wild. Well, he has nothing of that kind to do.

The Court. Do I understand, Mr. Ulrich, that your request for reopening concerns any effort to prove that Mr. Burns had any supervision over the crew or employees on the boats of the Standard Oil Company?

Mr. Ulrich. No.

The Court. I understand you do not intend to show that he had any general control or supervision of the boats?

Mr. Ulrich. No.

The Court. *Do you intend to show that he was requested* to give any orders in supervision or control over the persons or the boats?

Mr. Ulrich. I do not intend to show he had any control over the movements of the men.

The Court. Do I understand that your offer means to prove that Mr. Burns in his office as an official of the company was requested to use the company's automobile for any other purpose than the conveyance of the captain and the engineer in returning from their holiday to their duties on the boat?

Mr. Ulrich. In this particular instance he authorized the use of the automobile for the company's purposes in getting the men back to the boat.

The Court. Was there any other company's business of any kind connected with your offer of proof that Mr. Burns was requested or concerned with furthering than the matter, whatever inference may be drawn from it, of assisting these two men in returning to the boat?

Mr. Ulrich. That's all.

Mr. Wild. From the offer of proof, as it now appears, it would not change the Court's ruling, and counsel has in everything he contends to be a fact.

Mr. Ulrich. If it will be admitted, as a matter of record, that Mr. Burns authorized the use of this car for the purpose of getting the men back to the boat, and further admitted that Mr. Burns is a representative of the Standard Oil Company on Maui.

The Court. I understand the extent of opposing counsel's admission is that Mr. Burns is distributing and sales manager of the Standard Oil Company products on the Island of Maui, having no supervision or control over the movement of the boats.

Mr. Wild. That is an accurate statement.

The Court. And automobile in question, Mr. Burns was under no orders or requests on company business other than could be inferred by your argument that the return of the men from their holiday in some way benefited and expedited the company's affairs as to the boat.

Mr. Wild. We will admit that.

The Court. Well, then it is not necessary to take the offer, and I deny the motion.

Mr. Ulrich. Exception to the denial of the Court to reopen."

It is obvious that the Court properly refused permission to reopen to call Mr. Burns as a witness when it appeared that he had come over from the Island of Maui to Honolulu at the request of plaintiffs' counsel, had remained in atendance at the Court, had not been called and had, therefore, returned to Maui.

When counsel was offered an opportunity to interview an officer of the defendant, he did not accept the offer but, instead, admitted that he did not expect to prove that Mr. Burns had any control over the movements of the men employed upon defendant's boats or any general control or supervision over the boats. He finally admitted, in substance, that all he could hope to prove was that Mr. Burns wanted to assist the two men in returning to the boat. Quite a natural attitude, we assume, for one golf player to assume toward another—his guest.

In view of the allegations of the complaint, of the fact that there had been a criminal trial with which counsel were apparently familiar, of the fact that Mr. Burns had been in attendance upon Court at the request of plaintiffs' counsel, and of the fact that when offered permission to interview defendant's officers, they did not accept the offer, it would have been an abuse of discretion if the Court had permitted the reopening of the case after both sides had rested and defendant had moved for a directed verdict.

The granting or refusal of a motion to reopen is peculiarly in the discretion of the trial Court and an Appellate Court will not interfere except in a clear case of abuse of discretion.

Loftus v. Fischer, 113 Cal. 286, at 289:

"So, too, it was not error for the court, after the case had been closed, to refuse to open it for the taking of further evidence. No showing is made that it had but newly come to the knowledge of plaintiff, and indeed, as the offered evidence was a part of defendant's answer in another action between the same parties, it is at least presumable that its existence and materiality were known to plaintiff all the time."

Apropos of the situation presented by our record, we quote from the opinion of the Circuit Court of Appeals for the Second Circuit in *Goddard v. Crefield Mills,* 75 Fed. 818, at 820:

"Thereupon, the case being finally closed by both sides, defendants recalled the witness Pope, whom they had once examined, and offered to show by him 'what would be a reasonable time'. The record contains no excuse for this belated tender of evidence, which defendants had had abundant opportunity to introduce in its proper place, and the court quite rightly refused to open the case to let it in."

There, as here, no excuse was offered for the belated tender of evidence.

The Philadelphia and Trenton Railroad Company v. Stimpson, 14 Peters 448, 10 L. Ed. 535, at 543:

"The next and last exception is to the rejection of the evidence of Dr. Jones, who was offered to prove that there were material differences between the patent of 1831, and the renewed patent of 1835, and to explain these differences. *No doubt*

can be entertained that the testimony thus offered was, or might be, most material to the merits of the defense. And the question is not as to the competency or relevancy of the evidence, but as to the propriety of its being admitted at the time when it was offered. It appears that the testimony was not offered by the defendants, or stated by them as a matter of defense, in the stage of the cause when it is usually introduced according to the practice of the court. It was offered after the defendants' counsel had stated in open court that they had closed their evidence, and after the plaintiff, in consequence of that declaration, had discharged his own witnesses. The question, then, is, whether it was at that time admissible on the part of the defendants as a matter of right; or whether its admission was a matter resting in the sound discretion of the court. If the latter, then it is manifest that the rejection of it cannot be assigned as error.

* * * * * * *

It seems to us, therefore, that all courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion; and, indeed, if we were called upon to say upon the present record, whether this discretion was, in fact, misapplied or not, we should be prepared to say that we see no reason to doubt that it was, under all the circumstances, wisely and properly exercised. *It is sufficient for us, however, that it was a matter*

of discretion and practice, in respect to which we possess no authority to revise the decision of the Circuit Court." (Italics ours.)

To the same effect are:

38 *Cyc.* 1364-1366;

Postal Telegraph Company v. Northern Pacific Railway Company (C. C. A., 9th), 211 Fed. 824;

Zanone v. Oceanic Steam Nav. Co. (C. C. A., 2nd), 177 Fed. 912.

V.

THE EVIDENCE WHICH PLAINTIFFS PROPOSED TO INTRODUCE IF THE MOTION TO REOPEN HAD BEEN GRANTED IS MATERIAL ONLY IN DETERMINING THE PROPRIETY OF DENYING THE MOTION; IT IS NOT GERMANE TO THE QUESTION AS TO WHETHER OR NOT THE COURT SHOULD HAVE DIRECTED A VERDICT FOR DEFENDANT.

The appellants' "Statement of Facts" recites that the testimony had been concluded and the motion for directed verdict had been made, before plaintiffs moved to reopen or intimated that they desired to offer other testimony. (Trans. pp. 75-6.)

Counsel state (page 12) that on motions for nonsuit or directed verdict "all the evidence adduced or *offered* by the plaintiff is considered as true." We grant that all *adduced* is considered as true—which is one reason for the giving of the directed verdict in this case, as no other action could possibly have been taken in view of testimony of Mr. Warner, adduced by plaintiff.

But counsel make no argument and cite no authority for the statement that any *offered* testimony must be considered as true. It should be evident to counsel that only matters before the Court when the motion was made can be considered in determining whether or not it was properly granted. If evidence had been offered and excluded before the parties had rested, the error, if any, would be tested, not upon the validity of the direction of the verdict, but upon the error, if any, in the exclusion of evidence.

In passing, we note that counsel—quite properly—took his "exception to the denial of the Court to reopen" (Trans. p. 81), and *did not except to any refusal of offer of proof.*

There can be no question that excluded evidence cannot be considered except in connection with error in the ruling upon it—it forms no part of the record in the case for any other purpose.

> 1 *Hayne, New Trial and Appeal* (Revised Edition), page 542:
>
> "Excluded evidence will not be considered by the appellate court in reviewing the sufficiency of the evidence to support the findings."

> *Shepherd v. Turner,* 129 Cal. 530, at 532:
>
> "We know of no rule that would authorize us in any way to consider 'excluded evidence' in reviewing the sufficiency of the evidence as to a question of fact decided by the lower court. The only evidence we have any power to consider in such case is the evidence in the record, and not such as might be there. If the court rejects competent evidence, the proper exception is saved to

the ruling, this court will review the ruling, and if prejudicial error appears reverse the case."

Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625, syllabus:

"Where instruments are in the record on appeal only as identified offers of proof and not properly identified so as to admit them as evidence, because the trial court excluded them as privileged communications, the court on appeal may not accept and review them as evidence, but is limited to determining the question of their admissibility."

To the same effect:

Ewart Lumber Co. v. American Cement Plaster Co., 62 So. 560 (Ala.);

Schultz Construction Co. v. Lovett, 24 S. W. (2d) 330 (Ark.);

Schworm v. Fraternal Bankers' Reserve Society, 150 N. W. 714 (Iowa);

Eagle Lumber & Supply Co. v. De Weese, et al., 135 So. 490 (Miss.);

O'Dell v. National Lead Co., 253 S. W. 397 (Mo.);

Dolan v. Continental Casualty Co., 281 Pac. 182 (Ore.);

Brazelton-Johnson v. Campbell, 108 S. W. 770 (Tex.);

Hirsh v. Ogden Furniture & Carpet Co., 160 Pac. 283 (Utah);

Hill, et ux. v. Scott, 143 Atl. 276 (Vt.);

Carter Oil Co. v. Pacific-Wyoming Oil Co. et al., 263 Pac. 960 (Wyo.);

Pfeffenback v. Lakeshore & M. S. Ry., 41 N. E. 530 (Ind.);

Chicago, etc. Traction Co. v. Gervens, 113 Ill. App. 275;

Yezner v. Roberts, etc. Co., 140 Ill. App. 61.

As a matter of fact, there was never made an offer of proof in accordance with the requirements of law. Plaintiffs did make a motion to reopen and, in connection with that motion to reopen, they stated their desire to produce certain persons and to prove certain things, but at that time the testimony had been closed, they had no witness on the stand, and were not in position to make a valid offer of proof.

Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087, at 1091:

"When this witness retired from the stand, appellee announced that he rested his case. Appellant's attorney then said: 'We desire to offer evidence, your honor, on the question of inspection of the cars, and so forth.' The court replied: 'Very well, I won't receive any evidence, except as to the ownership of this line, at this stage.' Exception was taken * * * Appellant, in fact, offered no evidence upon the matter. No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence * * * If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the

question, and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the question asked."

To the same effect:

Huggins v. Hughes, 39 N. E. (Ind.) 298;
8 *Encyc. Plead. and Prac.* 236.

VI.

IT IS THE TRIAL COURT'S DUTY TO DIRECT A VERDICT FOR DEFENDANT WHEN THERE IS NO SUBSTANTIAL EVIDENCE TENDING TO PROVE ALL OF THE MATERIAL ALLEGATIONS OF THE COMPLAINT.

It was formerly the rule of decision that if there was a scintilla of evidence to support plaintiff's cause, the case should go to the jury, but that rule no longer obtains and the responsibility has been placed upon the trial judge to determine whether or not there is any substantial evidence produced which would sustain a judgment for plaintiff.

Improvement & R. R. Co. v. Munson, 14 Wall. 442, 20 L. Ed. 867, at 872:

"Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to

find a verdict for the party producing it, upon whom the *onus* of proof is imposed. *Jewell v. Parr,* 13 C. B., 916; *Toomey v. L. & B. R. R. Co.,* 3 C. B., N. S., 150; *Wheelton v. Hardesty,* 8 Ell. & Bl., 266; *Schuchardt v. Allen,* 1 Wall., 369."

To the same point we cite:

Small Co. v. Lamborn Co., 267 U. S. 248, 254;
Southern Ry. Co. v. Walters, 284 U. S. 190, 194;
Bowditch v. Boston, 101 U. S. 16, 18;
Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59, at 61-62;
Davlin v. Henry Ford & Son, 20 Fed. (2d) 317;
Curry v. Stevenson, 26 Fed. (2d) 534;
Chun Quon v. Doong, 29 Hawaii 539, at 544;
Ellis v. Mutual Telephone Co., 29 Hawaii 604, at 618-619;
Diamond v. Weyerhauser, 178 Cal. 540, at 542.

This rule prevails even though there may be a conflict in the evidence.

Est. of Sharon, 179 Cal. 447, at 459:

"It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power (to direct a verdict), if there be a conflict, it must be a substantial one."

We cite this last decision because counsel on page 1 of their brief have stated that there was a conflict in Warner's testimony. The claimed conflict was in the fact that in one instance the witness had testified he was going to the steamship and later had said that before going to sea he expected to stop in Kahului

and get something to eat. We see no conflict in these statements. There can be no question that he was going to the ship—even if he did intend to get a sandwich in Kahului before going aboard.

VII.

THE VERDICT WAS PROPERLY DIRECTED FOR THE UNCONTRADICTED EVIDENCE INTRODUCED BY PLAINTIFFS PROVED THAT WARNER WAS USING THE AUTOMOBILE FOR HIS OWN PURPOSES AND NOT AT ALL IN THE COURSE OF HIS EMPLOYMENT BY DEFENDANT.

The record discloses, without conflict, that Warner, with whose alleged negligence defendant is charged in the complaint (Trans. p. 3), was chief engineer on the "Lubrico," having the usual duties of a chief engineer on a steamship (Trans. p. 73), that he went ashore about 2:30 P. M., mostly to play golf with Mr. Burns (Trans. pp. 74-75), that the chief officer told him they would be ready to sail between 9 and 11 (Trans. p. 75), that he and Captain Daniels were returning to the ship and intended to stop at Kahului and have a sandwich before going on the boat (Trans. p. 74); that they *took* the car from Mr. Burns' garage to go back to the boat (Trans. p. 70); that Warner was on no errand connected with the boat, was performing no duties for defendant (Trans. p. 74), but was on a pleasure trip (Trans. p. 75); that no one on the ship had any authority over him when he was off the ship (Trans. p. 75), and that no one gave him any orders in connection with driving the car or as to where he should go. (Trans. p. 74.)

The record further states that the accident occurred between 7:00 and 8:00 o'clock (Trans. p. 70), and that it was Warner's "duty to be on the boat in time to sail" (Trans. p. 75), which, on this occasion, meant some time between 9:00 and 11:00.

The evidence discloses a typical case of a ship officer's holiday—a round of golf, a supper on shore, a care-free half-day. This time was his own, he was free to go and come as he pleased and his only duty was to be back on the boat in time to sail. It was obviously immaterial to defendant whether he rode, flew or walked back to the vessel and he had been given no orders in that regard.

There was a total failure of proof of the vital allegations of the complaint that Warner was "driving a certain automobile *on business for defendant, and while acting within the scope of his employment.*" (Trans. p. 3.)

The cases holding that an employer cannot be held responsible under such conditions are legion; they may be found in nearly every jurisdiction. We shall cite some of the decisions in analogous cases in which either the trial Court took the case from the jury, or a judgment for plaintiff was reversed.

The general rule, supported by a very large number of decisions, is thus stated in 42 *C. J.* 1099-1101:

> "To impose liability upon the owner for the act of the driver of his motor vehicle under the law of master and servant the driver must be acting within the scope of his employment, and the use of the vehicle must have been in the service of the owner or while about the owner's business, and if

it is not being so used, it is not material whether or not its use is by the permission of the master. Liability will not in the absence of statute or personal negligence upon his part be imposed on the owner merely by the fact that his servant is driving the vehicle at the time of the accident, or that the negligence of his chauffeur occurs during the period of employment."

39 *C. J.* 1296:

"*Act committed by servant when off duty.* If the act resulting in the injury is committed by the servant at a time when he is off duty, as for instance, after the day's work is completed, or at the noon hour, or where the servant has been given a holiday, the master will not be liable therefor; and it has been held that this is so, although the act is one which, if done by the servant while on duty and at a time when actually engaged in the master's service, would be within the course and scope of his usual and ordinary duties."

In *Rose v. Balfe,* 223 N. Y. 481, the New York Court of Appeals said:

"The evidence tending to disclose liability on the part of the defendant was limited to the testimony of Drenning, that at the time of the accident he was an employee of the defendant, and driving the car owned by defendant. Such fact was prima facie evidence of the responsibility of the defendant. Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406, Ann. Cas. 1916D, 1161. The presumption growing out of a prima facie case, however, continues only so long as there is no substantial evidence to the contrary. When that is

offered, the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely thereon."

Judgment for plaintiff was reversed.

In affirming a judgment of nonsuit in *Kish v. Cal. State Auto. Assn.,* 190 Cal. 246, the California Supreme Court said, at pages 248-9:

> "It is, of course, elementary that the master's liability, being predicated upon the fact of the employment, the master is not responsible for the acts of the servant while the servant is pursuing his own ends, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master. (26 Cyc. p. 1536; *Stephenson v. Southern Pacific Co.,* 93 Cal. 558 (27 Am. St. Rep. 223, 15 L. R. A. 475, 29 Pac. 234); *Brown v. Chevrolet Motor Car Co.,* 39 Cal. App. 738 (179 Pac. 697); *Berry on Automobiles,* sec. 684.) Whether or not the master is responsible for the act of the servant at the time of the injury depends, therefore, upon whether the servant was engaged at that time in the transaction of his master's business or whether he was engaged in an act which was done for his own personal convenience or accommodation and related to an end or purpose exclusively and individually his own. In other words, if the servant used the automobile of his master not in furtherance of his master's business, but for his own individual use, he is merely a borrower and the relation of master and servant not existing during the course of such use, the master is not liable for his acts. (*Gousse v. Lowe,* 41 Cal. App. 715 (183 Pac. 295).)"

In the foregoing case the employee was driving a truck furnished him by defendant for use in installation of road signs and the employees had no stated hours of employment. At the time of the accident the driver and a fellow-employee were going to get their evening meal.

In *Menton v. Patterson Merc. Co.,* 145 Minn. 310, it appeared that one of defendant's employees, with defendant's consent, used defendant's truck upon a picnic to a nearby lake resort. Upon returning, the employee ran into plaintiff's automobile. The Supreme Court sustained a directed verdict for defendant and held that the presumption of liability was overcome by the evidence that the truck was being used for "the personal convenience and pleasure of the employee."

See also:

Doran v. Thomsen, 71 Atl. 296 (N. J.);

Gardner v. Farnum, 230 Mass. 193; 119 N. E. 666;

Johnston v. Cornelius, 193 Mich. 115; 159 N. W. 318.

Lane v. Ajax Rubber Co., 120 Atlantic (Supreme Ct., Conn.) 724:

"The court set aside the verdict because the driver of defendant's car at the time of the accident was not acting within the scope of his employment. The plaintiff's case depended upon the testimony of the driver, whom the plaintiff put on the stand, and who testified that at the time of the accident he was driving a car of defendant, which he was accustomed to use in the course of

his employment. On his cross-examination by defendant's counsel, he testified that at the time of the accident he had departed from his employment and was engaged upon his own matters, unconnected with his employment. There was no evidence in contradiction of this, and nothing whatever in the record to indicate that the witness was untrustworthy. * * *"

'No other course was open to the trial court than to set this verdict (for plaintiff) aside."

Fallon v. Swackhamer, 123 N. E. 737 (N. Y. Ct. of Apps.) at 738:

"An owner who gratuitously loans his car to a servant, or even to a member of his family for such person's own particular pleasure or business, is not liable for an accident thereafter happening. The person driving, whether the servant or agent as a member of the family, must at the time be engaged in the owner's business or purpose to render him liable." (Judgment for plaintiff reversed, evidence showing employee used car to take his mother—defendant's mother-in-law—from defendant's house to her own home and to give other of defendant's house-guests a ride.)

In *Babbitt v. Seattle School Dist.,* 170 Pac. (Wash.) 1020, plaintiff was injured in a collision with one Brown, an employee of defendant, while Brown was operating a motorcycle belonging to the defendant. It appeared that Brown's duty was to deliver parcels on a motorcycle, his hours of work being from 8:00 until 5:00, and it further appeared that there was a rule of the defendant that no motor vehicle should be used

for any other purpose than business purposes. On the day of the accident Brown quit work at five o'clock and started to go home on the motorcycle without the permission of anyone to use it, taking it for the purpose of saving carfare. This evidence was uncontradicted. The plaintiff claimed that the jury should not be bound by the testimony of Brown but the Court held that although he was an employee of the defendant he was not a party to the suit, was in no way interested in the outcome, his testimony was unimpeached and uncontradicted to the effect that he was using the motorcycle for his own convenience and therefore it appeared from the uncontradicted evidence that defendant was not liable. In considering the presumption of liability of the employer based upon ownership of the instrumentality causing the injury as well as the question of liability for the act of the servant while engaged in business for his employer the Court says on page 1022:

> "The presumption, growing out of a prima facie case established by proof of the injury and the ownership of the motorcycle and the use thereof by an employee of the owner of the motorcycle, subsisted only so long as there was no substantial evidence to the contrary. When that was offered, the presumption disappeared, unless met by further proof. Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence. (Citing cases.)
>
> Upon the undisputed and competent evidence as to the motorcycle being in Brown's possession at the time of the accident without authority and of his not being at the time acting in the scope

of his employment in any capacity, reasonable minds could not differ, and there was no evidence or inference from evidence upon which the jury was justified in holding appellant liable."

It is respectfully submitted that the case at bar falls squarely within this language.

In *Hall v. Puente Oil Co.,* 47 Cal. App. 611, Roberts was a travelling salesman whom defendant permitted to use its car for personal purposes after working hours and on holidays. The accident occurred after working hours. The Court said:

"Respondent lays much stress upon the fact that the use of the car by Roberts for his own purposes was with the consent of the Puente Oil Company, his employer. At most, this was a mere lending of the car to him for his own use, as to which, says the court in Brown v. Chevrolet Motor Co., supra, 'it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower,' in support of which the court cites Berry on Automobiles, Sec. 684, Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81, and Segler v. Callister, 167 Cal. 377, 139 Pac. 819, 51 L. R. A. (N. S.) 772. *We are unable to draw any distinction between a case where the use of the car by a servant for his own purpose is without the master's consent and that where such use is permissive. Carried to its logical conclusion, the contention of respondent, which was adopted by the trial court, would render the owner of a shotgun liable for the act of one to whom he had loaned it for use on a hunting trip and due to whose negligent use*

thereof he had shot another. Our conclusion, therefore, is that the findings of which appellants complain are not supported by the evidence." (Italics ours.)

Nussbaum v. Traung Co., 46 Cal. App. 561:

"If the rule be extended to hold the master liable for the negligent acts of a servant while on his way to report for duty in the morning, the master would also be liable for the negligent acts of the servant while preparing his dinner pail before leaving his home, because he is then preparing or in a sense on his way to report for duty; and also the master under such a rule would be liable for the negligent act of a servant from the time he arose from his bed in the morning in preparation to report for his day's duties. The statement of such a rule reduces it to an absurdity."

See also:

Whiteoak Coal Co. v. Rivoux, 102 N. E. (Ohio) 302;

Mauchle v. Panama Pac. Exp. Co., 37 Cal. App. 715;

Lucas v. Friedman, 24 Fed. (2d) 271 (C. A., D. C.).

Counsel in their argument overlooked the fact that where a servant is off on a holiday he does not again act in the course of his employment until he has resumed his duties as employeee.

Gousse v. Lowe, 41 Cal. App. 715 at 719:

"In a very few cases in other states when the tort occurred on the homeward journey of the dis-

obedient servant the master has been held liable, but the great current of authority, in this country and in England, is against those isolated cases. (*Danforth v. Fisher,* 75 N. H. 111 (139 Am. St. Rep. 670, 21 L. R. A. (N. S.) 93, 71 Atl. 535); *Colwell v. Aetna etc. Co.,* 33 R. I. 531 (82 Atl. 388); *Reynolds v. Buck,* 127 Iowa, 601 (103 N. W. 946); *Riley v. Roach,* 168 Mich. 294 (37 L. R. A. (N. S.) 834, 134 N. W. 14); *Ludberg v. Barghoorn,* 73 Wash. 476 (131 Pac. 1165); *Chicago etc. Ry. Co. v. Bryant,* 65 Fed. 969 (13 C. C. A. 249); *St. Louis Ry. Co. v. Harvey,* 144 Fed. 806 (75 C. C. A. 536); *Hartnett v. Gryzmish,* 218 Mass. 258 (105 N. E. 988); *Solomon v. Commonwealth Trust Co.,* 256 Pa. St. 55 (100 Atl. 534); *Mitchell v. Crassweller,* 13 Com. B. 237; *Storey v. Ashton,* L. R. 4 Q. B. 476.) They cannot be supported upon any sound reason. If the servant takes his master's machine for a junketing or a business trip of his own, the trip is not complete when he reaches a point miles away from the place where the machine ought to be. *The servant is upon his own trip until his return to the point of departure, or to a point where in the performance of his duty he should be.*" (Italics ours. Hearing denied by Supreme Court.)

The record in our case discloses, without contradiction, that Mr. Warner's duties were on board ship and that his only duty upon the night in question was to be on the vessel in time to sail.

Appellants' contention is that the mere ownership of the car by defendant and the fact of its being driven by the chief engineer of one of its vessels necessitates the case being submitted to the jury. In

most of the cases above cited the car was owned by the defendant and operated by defendant's employee.

The weakness of appellants' contention lies in the fact that whatever inference arose from those facts disappeared when they introduced the testimony showing without contradiction that Warner was off on a holiday and was not driving "on business for defendant" or "while acting within the scope of his employment," as charged in the complaint.

Counsel evolve a new theory of automobile law and apparently seek to remove automobile cases from the doctrine of *respondeat superior*. Nevertheless, that doctrine controls in all cases where the owner is not personally operating the car, with three exceptions: first (in some jurisdictions), where the car is provided for family use; second, where *by statute* the owner is held responsible for permissive use, though not about his business; and, third, where the car is permitted to be used by a known incompetent or reckless driver. The case at bar does not fall within any of these exceptions.

Counsel seek to bring Warner within the class of one acting in the course of his employment by contending that the use of defendant's automobile shortened Warner's time off and lengthened the time of his employment. There are several obvious answers to that contention.

First, the Court will not assume that defendant's automobile would convey him more rapidly than one hired from a third person. Counsel, upon his motion to reopen, admitted that he did not propose to show

that there were no other ways of getting to the boat—but merely that use of defendant's car was a reasonable way. (Trans. p. 78.) It might easily be inferred that a local driver, being familiar with the road, could have shortened the driving time.

Second, counsel assume that it was Warner's duty to be on the boat from two to four hours ahead of sailing time, whereas the testimony is that it was his duty to be on the boat "in time to sail." (Trans. p. 75.) There was absolutely no evidence that he had any idea of lengthening his time of employment. We venture the suggestion that he would have gone by automobile, whether hired, borrowed or donated, so that the use of *defendant's* machine is a false quantity.

Third, Warner was going to stop in Kahului to eat. Using defendant's car might have shortened, or lengthened, his eating time—dependent upon whether it or another car would have made the better time—but whether it would have done so, or would have affected in any way his time of employment on the boat, is purely speculative.

We call particular attention to the total failure of proof. The theory of plaintiffs' case—and the cause of action relied upon—as set forth in the complaint was strictly that of *respondeat superior*. Eliminating non-essential words, the complaint charged:

> "That on June 16, 1930, one Reginald C. Warner was an employee or agent of said defendant" and he "while driving a certain automobile *on business for defendant, and while acting within the scope of his employment*" negligently collided with Felix Angco.

There was a total failure of proof of the quoted allegations.

With this theory of plaintiffs' case clearly set forth in their complaint, they come into this Court with a new theory and say that in the "new law of automobiles the emphasis has been shifted from the *agent* to the *agency.*" (Brief, p. 4.) We submit that the law has never changed, but counsel are seeking to shift from the cause of action set forth in their complaint to a new theory of their own which finds no support in texts or decisions, except in the one or two jurisdictions where an automobile is held to be a "dangerous instrument."

On page 4 they enlighten us with an abridged bibliography of automobile law—but they do not quote a sentence from any of these texts to support their new theory.

One of the texts most often cited is *Huddy* on *"Automobiles,"* and we quote from the 8th edition of that work, Sec. 747:

> "The general rule is, that in an action against the owner of a motor vehicle for injuries occasioned by the negligence of the driver thereof, the owner is not liable merely because the driver is in the general employ of the owner. To charge the owner, it must also appear that the driver at the time of the accident in question was acting within the scope of his master's business.
>
> When the owner of an automobile is sued for damages on account of an injury caused by the machine while driven by his chauffeur, the rules of law touching master and servant and the lia-

> bility of the former for the acts of the latter, are to be applied. A *prima facie* case which will hold the owner, unless counter evidence is produced, may sometimes be created on proof of the ownership of the machine and general employment of the chauffeur, but such *prima facie* case will be dispelled on proof that the servant at the time was not acting within his employment."

To the same effect are:

Berry on *"Automobiles"* (6th Ed.), Sec. 1315;
Babbitt on *"Motor Vehicles"* (3rd Ed.), Sec. 1207.

The doctrine of *respondeat superior* is just as applicable to automobile negligence cases as it is to other branches of negligence law—which counsel clearly recognized when they set forth their cause of action in the complaint.

Counsel seem to rest their case very largely on the decisions in *d'Aleria v. Shirey,* 286 Fed. 523; *Stuart v. Doyle,* 112 Atl. 653; *Silent Automatic Sales Corp. v. Stayton,* 45 Fed. (2d) 471, and *Anderson v. Southern Cotton Oil Co.,* 74 So. (Fla.) 975. To comment upon all of appellants' citations would make this brief interminable and we shall content ourselves with analyzing the decisions upon which they place their chief reliance.

In *d'Aleria v. Shirey,* the decision was founded upon the fact that defendant's car was delivered to the driver for use in defendant's business, namely, to return it to the garage and, possibly, to go to a music store, and that mere "deviation of a few blocks for

ends of his own'' did not take the case out of the doctrine of *respondeat superior.*

Also, the defendant and the driver differed as to the instructions given him when the automobile was placed in his charge.

Furthermore, the testimony to rebut the inference was not produced—and therefore vouched for—by plaintiff as was done in the case at bar.

In *Stuart v. Doyle* the driver was not engaged in a personal venture of his own, as was Warner on his holiday at Paia; O'Neill, the driver, was engaged in his employer's business. It was the custom of the farm laborers to telephone O'Neill on their arrival at South Windsor and it was O'Neill's duty to see that they were taken to defendant's farm. To be sure, it was not in the regular line of O'Neill's duties to transport the laborers but he was unable to reach the defendant by phone to arrange for their transportation and was confronted with an emergency. The Court commented upon this when it spoke of ''the circumstances under which it was done''.

The Court also stated that the evidence was ''ambiguous in its nature'', whereas in our case there was no ambiguity and no question as to the nature of Warner's jaunt to Paia and return.

In *Silent Automatic Sales Corp. v. Stayton,* Dittmar and other of defendant's employees had been sent out on a job and on completion of installation were being taken home in defendant's truck *which was regularly stored over night in Dittmar's yard.* The quotation of excerpts from the opinion will demon-

strate the difference between that case and ours. We quote:

> "Curry v. Stevenson, 58 App. D. C. 162, 26 F. (2d) 534, recognizes the presumption, but holds that it may be overcome by uncontradicted proof to the contrary; that, in such case, the question is one for the court and not for the jury.
>
> It is felt to be unnecessary to multiply cases that may be adduced upon the lines indicated in the foregoing citations. The obvious rule deducible therefrom is that the presumption created vanishes, if at all, only when rebutted by uncontradicted proofs. That, in such case, the question is one for the court, and it would follow, we think, that the court would take the matter from the jury only upon the well known principle that the evidence in a given case is so clear that reasonable men cannot differ as to the verdict which ought to be rendered."

We are not surprised at the citation of *Anderson v. Southern Cotton Oil Co.,* in view of appellants' new theory of the law of automobiles, but suffice it to say that Florida is in a hopeless minority in holding that an automobile, in operation, is a "dangerous instrument"—which is the basis of the *Anderson* decision.

The Court will find that all of the cases cited by counsel on pages 19 to 23 of their brief are readily distinguishable upon their facts from our case.

For example, in *Ackerson v. Jennings,* 140 Atl. 760, the Court held (p. 762) that the banquet was "intended principally, if not solely, to promote legitimate and important interests of the defendant's business".

In *Good v. Berrie,* 123 Me. 266, the Court said (p. 631) that the driver, a roving phonograph salesman, "was apparently on the way to the home of Mr. Hoyt, with whom he had left a phonograph for trial".

In *City of Ardmore v. Hill,* 293 Pac. 554, the Court said (p. 555) that it might logically be inferred that the driver was using the car "for the purpose of having it with him, for use in case of an emergency call to duty".

In *DiMarco v. The Company,* 220 Ill. App. 354, the "separate business", mentioned by counsel, was found by the Court to be a subsidiary of defendant, its employees subject to the orders of defendant's manager and superintendent, and that there was "other evidence justifying the finding".

In *Mullins v. Richie Grocery Co.,* 35 S. W. (2d) 1010, there was conflicting evidence as to whether or not the employee was engaged in defendant's business (attempting to make collection of accounts) and, accordingly, sent the case to the jury.

In some of the other cases the drivers were automobile salesmen, with authority to sell cars at any time and place when they could find a purchaser and it was held that there was evidence tending to show they were acting in course of employment.

It will serve no useful purpose to lengthen this brief with a further discussion of appellants' citations. In none of them did a situation exist which was analogous to ours.

VIII.

PLAINTIFFS DID NOT STAND UPON AN INFERENCE OR A PRESUMPTION BUT PRODUCED MR. WARNER AS THEIR WITNESS TO PROVE THE FACTS AND ARE BOUND BY HIS TESTIMONY.

Counsel charge that Mr. Warner was a "hostile, evasive and unwilling witness"—and there counsel ran out of adjectives. They do not say that he was untruthful or that there was even a hint of improbability in his testimony. If he had been a purser instead of a chief engineer they would probably accuse him of perjury and claim that he had business to transact for defendant in Paia, but it would be too strong a strain on one's credulity to suggest that a chief engineer on a vessel would have business inland.

We submit that there is no evidence before the Court to sustain the charges made against Warner's character as a witness. As a matter of fact, appellants' "Statement of Evidence" does not even disclose that Warner was employed by defendant at the time of the trial of this case.

The testimony of Mr. Warner is wholly reasonable and probable—in fact one could hardly conjure up any reason for his going inland to Paia except upon a pleasure jaunt.

Plaintiffs produced him as a witness and, therefore, vouched for his credibility. They did not claim to be surprised by his testimony or seek either to rebut it or to impeach him as a witness.

His testimony, offered as part of plaintiffs' case, put them out of Court. As was said in *Kish v. Cal. State Auto. Ass'n.*, supra, at page 251:

> "If the same testimony which proved the relationship of master and servant proved that at the time of the act for which it is claimed the master was liable, the servant was not acting within the scope of and in the course of his employment, the *prima facie* case made by plaintiff is rebutted by the very proof offered to prove the first fact. It is not necessary, therefore, for the defendant to negate the master's liability, inasmuch as the plaintiff has done so herself. The proof at that stage lacks an essential element to support plaintiff's cause of action and an order granting a nonsuit is, therefore, proper."

In *Brown v. Chevrolet Motor Co.,* 39 Cal. App. 738, the plaintiff called as his witness the manager of defendant corporation who testified on direct examination that defendant owned the automobile causing plaintiff's injury and that West, who was driving it, was an employee of defendant. Upon cross-examination the manager testified that West had asked for and been granted permission to use the car to take his family out for a ride.

In affirming a judgment of nonsuit, the Appellate Court said:

> "Evidence elicited on cross-examination is regarded as testimony on the part of the party calling the witness, and not as evidence of the party cross-examining. Upon the determination of a motion for a nonsuit, all of the evidence produced on behalf of the plaintiff, both on direct and cross-examination, must be considered. Taking all this evidence into consideration, it appeared, without conflict, that, at the time of the

> accident, the automobile was being used by West solely in a pleasure excursion, for which purpose it had been borrowed by him from the defendant company." (Hearing denied by Supreme Court.)

The Court will note the striking analogy between the situation in the above case and ours so far as the production of the evidence is concerned.

In reversing a judgment against the owner in *Martinelli v. Bond,* 42 Cal. App. 209 at 212-213, the Appellate Court said:

> "It is further contended by respondent that he made a *prima facie* case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan, was his employee at the time of the accident. The presumption arising from such *prima facie* case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (*Maupin v. Solomon, supra; Brown v. Chevrolet Motor Co. of Cal., supra.*) In this case there is no conflict in the evidence as to the fact that, at the time of the accident, the automobile was in use by the employee for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner." (Hearing denied by Supreme Court.)

In the above case the employee—*who was a co-defendant*—testified that the trip was made "for the purpose of taking an outing" and that "it was not being used for any purpose connected with the busi-

ness of Mr. Bond." This testimony was held to destroy the presumption or inference.

In many of the decisions, and in counsel's argument in this case, the word "presumption" is frequently used when, as a matter of law, there is *no presumption* but only an *inference* arising from the proof of ownership and of employment of the driver.

This distinction was clearly pointed out by the Supreme Court of California in denying a hearing in *Maupin v. Solomon,* 41 Cal. App. 323, which was an automobile case involving the question of the employer's responsibility. We quote the Supreme Court's opinion (p. 326):

> "In denying the petition for hearing in this court after decision by the district court of appeal of the first appellate district, division one, we desire to point out that respondent's *prima facie* case was based solely on an 'inference,' and not on any 'presumption' declared by law. When we say that a certain inference is warranted by certain facts proved, we mean no more than that the jury is reasonably warranted in making that deduction from those facts. (Code Civ. Proc., sec. 1958.) In this case the direct uncontradicted evidence introduced in response to the *prima facie* case as to the circumstances under which the employee of appellant was driving appellant's automobile was of such a nature as to leave no reasonable ground for an inference based solely on the fact of appellant's ownership of the automobile and the further fact that the person driving was an employee of appellant, that the driver was acting within the scope of his employment at the time of the accident. The verdict, there-

fore, was contrary to the evidence, and this is all we understand the opinion of the district court of appeal to decide."

In *Pemberton v. Morris Fertilizer Co.,* 287 Fed. 517 (C. C. A., 5th), the Court of Appeals sustained a directed verdict for defendant, based upon the testimony of its employee, who was driving the car.

Even in jurisdictions where statutes permit parties to call their adversaries without making them their own witnesses, the testimony so elicited is binding unless overcome by other testimony.

Dravo v. Fabel, 132 U. S. 487; 33 L. ed. 421 at 422:

"So that, when the plaintiffs used the depositions of Dippold and Fabel (the principal defendants), taken 'as under cross-examination', they made those parties their own witnesses. While the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit."

In other words, the Supreme Court holds, as do the other Courts, that such testimony is binding upon plaintiffs the same as any other evidence introduced by them, unless they have contradicted or rebutted it by other testimony.

Aphoresmenos v. McIntosh, 189 Mich. 680 at 683:

"Plaintiff called defendant for cross-examination under Act No. 307, Pub. Acts 1909. After

giving testimony at length upon the material phases of the case, which testimony was not afterward contradicted, counsel assert that the plaintiff is not bound by it. *Testimony developed in this manner may be contradicted and overcome by other testimony, but its effect cannot be destroyed or put aside by mere assertion.*" (Italics ours.)

Krewson v. Sawyer, 109 Atl. (Pa.) 798 at 799:

"Defendant, who was called by plaintiff as under cross-examination, testified that the account up to January 1, 1913, had been *approved by plaintiff's decedent,* and vouched each of the items in the supplemental account attached to the affidavit of defense, with only a few slight changes in amount * * * *Neither plaintiff's other evidence nor that produced by defendant in any manner qualified the testimony above outlined, which must, therefore, be taken as true.* Dunmore v. Padden, 262 Pa. 436, 105 Atl. 559." (Italics ours.)

See also to the same effect:

Leystrom v. City of Ada, 110 Minn. 340 at 343;

Swank v. Croff, 245 Mich. 657 at 658;

Morningstar v. Northeast Pa. R. Co., 137 Atl. 800 (Pa., 1927).

If the testimony of a party, called by his adversary, must when uncontradicted, and not in itself improbable, be given full credence, then, obviously, the testimony of Mr. Warner, who was not a party or shown by the record to be interested in the outcome, must be accepted as true and binding upon plaintiffs.

The Federal Courts hold that where witnesses testify unequivocally and without contradiction their testimony must be accepted as true.

Choctaw & M. R. Co. v. Newton, 140 Fed. (C. C. A., 8th) 225 at 250:

"To make out a case they placed these engineers (engineers for Choctaw & M. R. Co.) on the witness stand, who testified at great length; and appellees invoke much of their testimony when it suits their purpose. No rule of evidence is better settled than that a party cannot impeach his own witness. Courts of high authority have said that a party thus using a witness may not then purposely contradict him, as he may not approbate and then reprobate. While it may be conceded that the rule does not preclude the party from showing, by other witnesses, facts inconsistent with those testified to by the witness thus introduced by him, nor from insisting before the court or jury that they should consider all the evidence and adopt that of one or the other witnesses, yet, such a party cannot impugn the integrity of the witness he has so introduced, and upon whose testimony he relies in part. He 'cannot be permitted by argument to say that the witness is unworthy of belief, or to destroy the effect of his testimony by argument which assumes that the witness is dishonest.' Ashley v. Board, etc., 83 Fed. 534, 27 C. C. A. 589; Graves v. Davenport (D. C.), 50 Fed. 881; United States v. Budd, 144 U. S. 172, 12 Sup. Ct. 575, 36 L. Ed. 384." (Certiorari denied by the Supreme Court in this case.)

Standard Water Systems Co. v. Griscom Russell Co., 278 Fed. (C. C. A., 3d) 703 at 705:

"There is a case somewhat analogous to the case at bar, so far as the calling of a defendant as a witness for a plaintiff is concerned, to be found in Coonrod v. Kelly (in this Circuit), 119 Fed. 841, 56 C. C. A. 353. There the bill did not waive answer under oath by the defendants, and the answers to the bill and to the interrogatories therein propounded were responsive, and were in general tenor and effect the same as testimony given by two of the defendants when called by the complainant. As Judge Gray puts it (119 Fed. at the bottom of page 846, 56 C. C. A. 358), alluding to the testimony of the defendants who had been called by the plaintiff:

'By this testimony he is bound, unless he can, by other witnesses and evidence, direct or circumstantial, show that their testimony is false. A complainant, who places the defendant on the stand, is not bound to refrain from contradicting him, where the exigency of the case demands it. In the case before us, however, there has been no testimony adduced to contradict that of Booth and Howlett. Whatever of improbability or suspicion may attend it, owing to the peculiar facts or circumstances of the case, it is not sufficient to countervail the effect of the direct testimony brought out by complainant from the defendants whom he called upon to testify.'

In the instant case, no facts or circumstances, of which evidence was offered, are sufficient to countervail the direct testimony brought out by the complainant from the two defendants whom it called upon to testify." (Certiorari denied by Supreme Court.)

Wirfs v. D. W. Bosley Co., 20 Fed. (2d) 632 at 633:

"A complainant who calls a defendant as a witness is bound by his testimony, unless he can by witnesses or other competent evidence show that his testimony is false."

Coonrod v. Kelly, 119 Fed. (C. C. A., 3rd) 841 at 846-7:

"Undoubtedly, the burden was upon the complainant, Coonrod, to establish to the satisfaction of the court one or both of these averments of his bill. This he has been unable to do. He has been compelled to rely upon the testimony of Booth and Howlett, the mortgagor and mortgagee, made defendants by the bill. By this testimony he is bound, unless he can, by other witnesses and evidence, direct or circumstantial, show that their testimony is false. A complainant, who places the defendant on the stand, is not bound to refrain from contradicting him, where the exigency of the case demands it. In the case before us, however, there has been no testimony adduced to contradict that of Booth and Howlett. Whatever of improbability or suspicion may attend it, owing to the peculiar facts or circumstances of the case, it is not sufficient to countervail the effect of the direct testimony brought out by complainant from the defendants whom he called upon to testify."

See also:

Gunther v. Ins. Co., 134 U. S. 110;

Delaware R. Co. v. Converse, 139 U. S. 469;

Four Packages v. U. S., 97 U. S. 404;

Potts v. Pardee, 220 N. Y. 431; 116 N. E. 78.

IX.

APPELLANTS' VIOLATION OF RULE 24 OF THIS COURT AND INSUFFICIENT ASSIGNMENTS OF ERROR.

We mention this point primarily to secure a ruling which may act as a guide in the future to members of the bar of this Circuit. There has been no attempt made by appellants to comply with the rule requiring a specification of the errors relied upon and there is no reference anywhere in the brief to any assignment of error. This may, or may not, be due to the fact that some, if not all, of the assignments of error are insufficient under the decisions. We shall now comment upon all of the assignments.

For example, the first assignment (Trans. p. 44) is too general and indefinite, being merely a statement that the judgment is contrary to the law and the evidence.

Hecht v. Alfaro (C. C. A., 9th), 10 Fed. (2d) 464, 466;

Lawson v. U. S. (C. C. A., 8th), 297 Fed. 418.

The second assignment (Trans. p. 45) is not only argumentative, but it cannot be determined therefrom whether the assignment is directed toward the refusal of an instruction requested by plaintiffs or the giving of the instruction directing a verdict for defendant.

The third, fourth and fifth assignments of error (Trans. pp. 45 and 46), are apparently based upon the opinion of the Supreme Court of Hawaii and such assignments are not available because the opinion forms no part of the record and has no binding effect upon this Court.

As was said by Judge Morrow in *Mutual R. F. Life Ass'n. v. DuBois* (C. C. A., 9th), 85 Fed. 586 at 589:

> "The insufficiency of the record in the present case is still further disclosed in the assignments of error, which are directed mainly to the opinion of the court, and cannot be considered, since the opinion of the court is no part of the record; and the only exception in the record is to the decision of the court 'upon the grounds that it was against law, and against the weight of the testimony in the cause, and not warranted by the testimony of the cause.' As the record does not present any question to this court for determination, the judgment of the circuit court is affirmed."

Stoffregen v. Moore (C. C. A., 8th), 271 Fed. 680 at 681:

> "These two assignments of error present nothing for review: First, because they are based upon the opinion of the court, which cannot be the basis of an assignment of error. The opinion may be wrong, and still the judgment be right."

If this case were pending in the Eighth Circuit, there is no question that the Court would dismiss the appeal or affirm the judgment for failure to set out a specification of errors in the brief as required by Rule 24.

City of Lincoln v. Sun Vapor Street Light Co. (C. C. A., 8th), 59 Fed. 756, is the leading case in that Circuit and it has been followed consistently. It was cited with approval in the Ninth Circuit in *Walton v. Wild Goose M. & T. Co.,* 123 Fed. 209. The most

recent cases are *Harlow Taylor Butter Co. v. Crooks,* 41 Fed. (2d) 627, and *Hard & Rand v. Bristol Coffee Co.,* 41 Fed. (2d) 625.

The failure of appellants to comply with the rules, in our case, has added greatly to our labors in preparing this brief and, we believe, will make the Court's task more arduous than it should be. We would appreciate a ruling as to whether or not Rule 24 is to be enforced in this Circuit.

X.

CONCLUSION.

Under the uncontradicted evidence in the record before this Court, there can be no question that Warner was upon a personal holiday and was not at all engaged in defendant's business. Appellants have gone far afield from the record in attempting to prove otherwise.

We have called attention heretofore to some of the appellants' statements finding no support in the record and we feel it to be our duty to the Court to direct attention to others before closing this brief.

The following entire statement (Brief, p. 2) is "drawn from thin air":

> "For example, the plaintiffs were and are ready to prove in that connection,
>
> (a) that earlier on the day of the accident, Burns had transported the Captain to The Company Office so that the Captain could make his report there, and

(b) that Burns, testifying before the Coroner's jury prior to the trial of Warner on a manslaughter charge, said, in reply to a question put by Mr. A. E. Jenkins, Counsel for Aetna Insurance Company, about the use of the Company car by Warner:

'Being Company Employees they took the car. A car assigned to a driver must be driven by himself, Company rules, unless we authorize someone else to drive it.' ''

The so-called "offer of proof" does not contain any of the matters above-mentioned and, as officers of this Court, we state that Aetna Insurance Company is not interested in this case, directly or indirectly. Another reference to the Aetna Insurance Company will be found on page 24. We might conclude, from these statements, that counsel think they are pleading their case before a jury.

Upon page 10 counsel state that the trial judge refused an offer of proof "on the short ground that even if he received the evidence offered, it would not change his ruling against them." The record contains no such statement from the Court and this Court, in considering the trial Court's denial of the motion to reopen, will note that it may be supported upon the ground that plaintiffs made no showing excusing the failure to offer the proof before the testimony had been closed and before Mr. Burns had returned from Honolulu to the Island of Maui.

On page 13 counsel state that plaintiffs were not in possession, at the time of trial, of the transcript of Mr. Warner's testimony. This may be correct but

the record does not so state, and on page 79 of the transcript appears a statement by appellants' counsel as follows:

> "We have a record of the testimony, so far as the lending of the car is concerned, taken at the other trials, and so far as his duties are concerned, we can call another officer of the Standard Oil Company."

On page 14 counsel state:

> "Warner was due back on the boat at 7:30 or earlier, for the reason that he had duties to perform thereon pursuant to his employment as Chief Engineer of the boat."

On page 15 is the following:

> "It was his duty to return by at least 7:30, and superintend, as Chief Engineer, the preparation of the boat for sailing."

There is nothing in the record to support these statements. Counsel attempt to put something into Mr. Warner's testimony that can not be found in it. The record shows that it was his duty to be on the boat in time to sail and that the sailing time was between 9:00 and 11:00 P. M., and there is no evidence that he had anything to do to prepare the boat for sailing, or that a chief engineer ever has such duty.

Here is another figment of counsel's imagination:

> "Warner was certainly not vouched for by plaintiffs. He had every reason to color his testimony. *He made it clear that the retention of his job depended on the outcome of the litigation.*" (Brief, p. 15.)

Such statement is the sort that has been criticized by the Courts, as we have shown in this brief, where counsel seeks to impugn the integrity of a person whom he has called as a witness.

The same sort of statement is found at the top of page 17 of the brief.

Again on page 15:

> "The accident occurred at *eight o'clock, when he should have been on the boat performing those duties* * * * while he was traveling in a Company car *whose use was authorized by the General Manager* * * *."

The italicized statements are unsupported by the record.

On page 18 is this:

> "Where the men were *before the situation became acute* at Burns' house in Paia, is entirely immaterial."

This statement savors of an attempt to mislead. There is nothing in the record to even suggest that a situation became acute, and counsel's statements when he was endeavoring to have the case reopened deny the possibility of it. He said (Trans. p. 78), that it was 6:30 in the evening, the boat was leaving between 9 and 10 or 11 o'clock, that it was approximately five miles to the boat and that he did not propose to show that there were no other ways of reaching it, but that he did suggest that taking defendant's car was a reasonable way.

In the "Conclusion" of their brief counsel let their enthusiasm completely dominate them and toss the record into the waste-basket. They say that Burns' duties were "naturally very broad," that he undertook the transportation of the men to the boat, that Warner was due back about 7:30, that it was 8:00 when the accident happened, that the car was furnished by defendant to Burns "for just such a purpose" and that it was his duty to expedite the passage of the defendant's boats. Then they increase the distance to Paia to 10 miles.

None of the things mentioned in the last paragraph hereof is sustained by the record.

It is not a pleasant task for an attorney to call attention to stretching of the record. We would prefer to agree that a fair statement had been made. It would have made it easier for both the Court and ourselves had this been done in this case.

In conclusion, may we say that, when the Court has read the appellants' "Statement of Evidence," as it appears in the transcript, it will be found that it contains nothing to sustain the allegations of plaintiffs' complaint that Mr. Warner was "driving a certain automobile on business for defendant, and while acting within the scope of his employment." On the contrary, the record proves, without contradiction, by testimony produced by plaintiffs, that he was on shore leave for a golf game and was neither under the control of defendant nor doing anything in its

business or in connection with his employment as chief engineer of a vessel.

The judgment should be affirmed.

Dated, San Francisco,
January 18, 1933.

Respectfully submitted,
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